U.S. Department of Labor

Office of Administrative Law Judges
90 Seventh Street, Suite 4-800
San Francisco, CA 94103-1516

(415) 625-2200
(415) 625-2201 (FAX)

Issue Date: 30 April 2007

CASE NO. 2000-LHC-02676

OWCP NO. 04-34646

In the Matter of:

L.G.,
Claimant,

v.

UNITED STATES MARINE CORP./MWR,
Employer.

Appearances: Steven Birnbaum, Esq.
For Claimant

Lawrence Postol, Esq.
For Employer

Before: Russell D. Pulver
Administrative Law Judge

DECISION AND ORDER ON REMAND AWARDING BENEFITS

This case arises from a claim for compensation brought under the Longshore and Harbor Worker's Compensation Act, as amended, 33 U.S.C. § 901 ("the Act") as extended pursuant to the Non-Appropriated Fund Instrumentalities Act, 5 U.S.C. §8171, et seq. The Act provides compensation to certain employees (or their survivors) engaged in employment with Non-Appropriated Fund entities for occupational diseases or unintentional work-related injuries, irrespective of fault, resulting in disability or death. This claim was brought against the United States Marine Corp./MWR ("Employer"), for cumulative industrial injuries Claimant suffered on February 1, 1994 and from psychological injuries related thereto.

It is necessary to briefly restate the facts and procedural history of this case. On October 15, 1993, Claimant injured her lower back while working for Employer, and subsequently returned to work. She reportedly had lower back pain that increased while performing inventory work for Employer in January and February 1994. Employer paid benefits and provided medical treatment. However, soon after, Employer disputed the necessity of ongoing medical treatment, resulting in a separate case that addressed the injury that occurred on October 15, 1993. A formal hearing was held on August 20, 1998 before Judge Michael Lesniak in Honolulu, Hawaii,

regarding Claimant's ongoing medical care related to her October 15, 1993 work related injury. Employer's medical expert, Dr. Henrickson, testified that the October 15, 1993 injury had resolved within one week but that Claimant had suffered cumulative trauma, which he considered a new injury, in early 1994. *See* August 20, 1998, Hearing Transcript ("TR") at 80.[1] Finding it impossible to distinguish between how much of Claimant's ongoing medical needs were the result of her work injury and how much were due to her pre-existing back condition, Judge Lesniak awarded past and continuing reasonable and necessary medical expenses. Judge Lesniak's Decision and Order at 18-19, 1998-LHC-698 (March 23, 1999), admitted into evidence as EX 1.

On July 27, 1999, Claimant filed the present claim for medical benefits and compensation based on medical and psychological injuries arising from the February 1, 1994 cumulative back condition. Employer filed a Motion for Summary Decision on October 18, 2000, based on res judicata, collateral estoppel, election of remedies and untimely notice and filing of claim. On January 19, 2001, Judge David Di Nardi granted Employer's Motion. 2000-LHC-2676. On appeal, the Board vacated the decision, holding that the claim for the 1994 injury was not barred by the doctrines of res judicata, collateral estoppel, and election of remedies, and that genuine issues of material fact concerning the 1994 injury existed concerning timeliness under Sections 12 and 13 of the Act. BRB No. 01-0462 (not published). Accordingly, the case was remanded.

A formal hearing was held by the undersigned on January 5, 2004, in Portland, Oregon. All parties were afforded a full and fair opportunity to present evidence and arguments.[2] Administrative Law Judge Exhibits ("AX") 1-8, Claimant's exhibits ("CX") 1-15, and Employer's exhibits ("EX") 1-100, were admitted into the record. Claimant, her husband, and vocational expert Scott Stipe testified at the hearing. The deposition transcripts of Dr. Robert Gordon, Dr. Thomas Rosenbaum, Dr. Brian Schulman, and Dr. Patrick Taylor were accepted into evidence. On November 16, 2004, the following findings were made by the undersigned: 1) the claim was not barred by Section 12 or Section 13 of the Act; 2) Claimant was unable to return to her usual employment; 3) Claimant's cumulative lower back injury was caused by work related activities; 4) maximum medical improvement was attained on March 20, 2003; 5) Employer established availability of suitable alternate employment as of May 14, 2003 at a post-injury wage-earning capacity at least equivalent to Claimant's pre-injury average weekly wage. Decision and Order at 13-26. Claimant was awarded periods of temporary and permanent total disability benefits, as well as medical benefits pursuant to Section 7 of the Act, 33 U.S.C. § 907. *Id*. at 26.

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[1] Although Judge Lesniak found Dr. Henrickson's testimony insufficient to show that medical treatment related to the October 1993 injury was no longer reasonable or necessary, he did not conclude Dr. Henrickson's testimony lacked veracity or reliability as to the new cumulative injury. *See* Judge Lesniak's Decision and Order at 4-7, 1998-LHC-698 (March 23, 1999), admitted into evidence as EX 1.

[2] The parties stipulated to the following periods of compensation: Employer paid Claimant temporary total disability benefits, from February 9, 1994 through May 10, 1994 at a stipulated wage of $130.17 per week. EX 2. Employer paid temporary partial disability compensation at a rate of $43.40 per week from May 11, 1994 to July 5, 1994. *Id.* Claimant also received temporary partial disability from July 6, 1994 through May 25, 1995 at the rate of $130.17 per week. *Id.*

On appeal, the Board affirmed the holding as to Sections 12 and 13 but remanded the case regarding the following: 1) why the medical opinions of Drs. Taylor and Henrickson were given greater weight than the contrary opinions of Drs. Gordon, Foltz, and Rosenbaum; and 2) whether Employer established suitable alternative employment prior to May 14, 2003, the date of the latest labor market survey. BRB No. 05-0234 (November 30, 2005) (not published).

On remand, Claimant sought to add evidence showing the impact of Claimant's psychological injury on her ability to perform jobs identified as suitable alternative employment. The record was reopened, over Employer's objection, on March 31, 2006, and such evidence was admitted by the undersigned in order to ascertain the rights of the parties. *See Bakke v. Duncanson-Harrelson Co.,* 13 BRBS 276 (1980), citing 20 C.F.R. § 702.339. Therefore, all submitted exhibits were admitted into the record, as follows: Claimant's exhibits ("CX") 21-25, and Employer's exhibits ("EX") 101-128.

FINDINGS OF FACT

The following are factual findings most salient to disposing of the issues on remand. However, also considered were the factual findings found in the prior Decision and Order by the undersigned dated November 16, 2004.

Summary of Medical Examinations

Patrick Taylor, M.D.

Dr. Taylor is a board-certified neurosurgeon. CX 8 at 37. He saw Claimant on December 19, 2003. CX 15 at 1. In his deposition of February 3, 2004, Dr. Taylor testified that he diagnosed Claimant with a congenital defect called spondylolisthesis and lolysis and a related defect, pseudoarthrosis. CX 20 at 13, 42. In addition, Dr. Taylor diagnosed Claimant with chronic pain syndrome secondary to the initial trauma and failed surgery with a resulting depression and other related psychological factors. *Id*. at 42, 44, 73, 112. His testimony provides extensive detail concerning the diagnosis of spondylolisthesis and lolysis (flaws in the vertebra), as well as pseudoarthrosis. *Id*. at 13. The latter is a defect of instability brought about when the spondylolisthesis and lolysis cause improper positioning of the spine, causing slippage where the vertebra shifts out of place. *Id*. If too much slippage of one vertebra on another occurs, the bones may begin to press on nerves, ligaments, and the supporting spinal structure, which can lead to additional complications such as cartilage build-up and/or emergence of a pseudojoint. *Id*. at 13-14.

Dr. Taylor testified in his deposition that medicine has not advanced to the point where the exact problems related to an individual's spondylolisthesis and pseudoarthrosis can easily be pinpointed. *Id.* at 14. Therefore, it is difficult to measure objectively exactly what aspect of Claimant's condition may be generating the lower back pain she is experiencing. *Id.* at 14-15. From the record, Dr. Taylor determined that Claimant had no symptoms from the spondylolysthesis, nor did she even know she had the condition, until she was scrubbing a floor extensively as a Marine recruit, an activity that brought on lower back pain. *Id.* at 15. She received an x-ray and was diagnosed with the condition. *Id.* She experienced some lower back

pain intermittently but received very little treatment other than pain medication when needed. *Id.* at 16. The pain was minimal and non-debilitating. *Id.; see also* EX 11 at 1-2.

Dr. Taylor testified to the following ways Claimant's lower back injuries impacted her functioning and pain levels. Prior to the initial injury of October 15, 1993, Claimant did not have significant pain and was able to work. CX 20 at 16. She merely experienced intermittent pain that did not debilitate her or require extensive treatment. *Id.* at 15-16. She occasionally received pain medication. *Id.* Following the October injury, Claimant experienced some pain, yet it was not debilitating. *Id.* She kept working, and was treated with pain medication. *Id.* After the February injury, Claimant experienced a significant increase in her pain and was unable to work. *Id.*

Dr. Taylor found it impossible to separate the effects of this initial injury from the effects of the subsequent injury of February 1, 1994. He opined that he could not determine whether the first injury alone would have permanently aggravated the spondylolysthesis, but determined that the initial incident along with the cumulative injury of February 1, 1994 resulted in permanent aggravation. *Id*. at 18. He also testified that one of two scenarios occurred as to the injury of February 1, 1994: 1) due to the rigorous inventory tasks Claimant completed after the initial October 1993 injury, a cumulative trauma occurred, leading to a cumulative injury on February 1, 1994 that permanently aggravated the initial injury, or that, alternatively, 2) Claimant experienced a discrete, specific injury on February 1, 1994 that permanently aggravated the initial injury. *Id.* Dr. Taylor opined that it is likely the 1993 injury caused lumbosacral strain, resulting in more intense and more frequent pain than that caused by the pre-existing condition. *Id*. at 54-55. He explained that when the 1994 injury occurred, the degree of Claimant's pain increased significantly, and this was the injury that caused permanent damage. *Id*. at 82. Dr. Taylor testified that he believes that if Claimant had not received the 1994 injury, she would have fully recovered from the 1993 injury. *Id*. at 99.

On July 6, 1994, Claimant underwent an L5-S1 fusion and insertion of a bone growth stimulator, performed by Dr. Kahanovitz. TR at 137; EX 14A at 1. Dr. Taylor commented on this first surgery. He testified that the choice of fusion surgery was appropriate because its purpose was to address non-radicular back pain. *Id*. at 21. He stated that he believes Claimant's pain was not due to the pre-existing spondylolisthesis alone, but could not separate out whether the pain was due to the initial injury in October 1993 or the reported injury of February 1994. *Id*. at 58. Though initially the 1994 fusion resulted in improvement, this was followed by significant deterioration. *Id.* at 26. Dr. Taylor attributes the deterioration to two problems: 1) a failure of the fusion to heal properly, and 2) instability of the lower back caused by the surgery. *Id.* According to Dr. Taylor, these problems led him to conclude that the 1994 surgery worsened Claimant's condition. *Id*. Dr. Taylor testified that medical records reflect that subsequent to the 1994 surgery Claimant experienced chronic pain, was treated with narcotics, and was eventually diagnosed with instability by Dr. Mason. *Id*. at 30, 107. Claimant also developed left-sided sciatic syndrome after the first surgery. On February 7, 1995, Claimant underwent a surgical procedure to remove the electrical bone graft stimulator, but Claimant's relief from lower back pain was only temporary. EX 14 at 11. Dr. Taylor concluded that because of the diagnosis of this syndrome and a positive electrodiagnostic study, the second major surgery Claimant received was the optimal treatment choice. *Id*. at 32. Dr. Taylor noted that the EMG study that

took place on August 16, 1996 resulted in a diagnosis of polyradiculopathy, mild, at the L5-S1 levels on the left side. *Id*. at 32, 58; *see also* EMG report by Dr. Thomas M. McNorton, EX 20 at 1-2. Dr. Taylor testified that the EMG supports his diagnosis of nerve problems in Claimant's lower left extremity. *Id*.

The second major surgery occurred on May 22, 2001, and included a decompressive laminectomy as well as a reinforced re-fusion to eliminate the instability. *Id*. Initially, the surgery resulted in improvement but the lower back pain returned in November 2002. *Id*. at 35-36. Dr. Taylor testified that he believes the second surgery itself could have caused further pain due to the following: removal of bone; implantation of reinforcing hardware; scarring; and nerve interruption with possible pain-producing neuromas. *Id*. at 33-34. He opined that the latter would be the likely source, at least in part, of Claimant's chronic pain. *Id*. at 34-35. Dr. Taylor testified that he finds Claimant to be fully credible. He did not find Claimant was malingering or conscious about the psychological component that has exacerbated her pain problems. *Id*. at 43, 86-88. He believes that Claimant's functioning varies from day to day as is common for patients with chronic pain, stating that this explains the discrepancy between her testimony and the surveillance film. *Id*. at 51-53, 87-88. Dr. Taylor opined that a psychological component occurred at some point for Claimant, contributing to the diagnosis of chronic pain syndrome. *Id*. at 44, 73, 112. He diagnosed Claimant with chronic pain syndrome secondary to the injuries and failed surgery, with a resulting depression and other related psychological factors. *Id*. at 42, 44, 73, 112.

Dr. Taylor testified that Claimant's work restrictions due to her work related injury bar her from lifting more than 20 pounds, any repetitive lifting, repetitive bending, or repetitive sitting. CX 20 at 46. To avoid repetitive (lengthy) sitting, Claimant would need to take mini-breaks to get up and stretch. *Id.* Dr. Taylor also opined that in order to surmount both the physical and psychological obstacles to return to work, Claimant would need to be assessed and treated psychologically, and that at first Claimant could not be expected to perform a full time job. *Id*. at 47-48.

John Henrickson, M.D.

Dr. Henrickson, who is a board-certified neurosurgeon, testified at the 1998 hearing to determine whether Claimant's ongoing medical care was reasonable and necessary as a result of her October 15, 1993 work injury. EX 1 at 4-7.[3] Dr. Henrickson testified at the hearing that the October 15, 1993 injury was a mere contusion that resolved within one week and Claimant had suffered cumulative trauma in early 1994. *See* August 20, 1998, Hearing Transcript at 80.

Dr. Henrickson performed an independent medical evaluation on September 30, 1996. EX 21 at 1. His report from that same date was admitted into evidence by Judge Lesniak at the August 20, 1998 hearing. According to Dr. Henrickson's testimony and his report, the 1994 injury constituted a new injury and her ongoing nerve root irritation was caused not only by the pre-existing condition but also by the surgery Claimant received for the work related condition.

[3] Judge Lesniak never specifically ruled that Dr. Henrickson was wrong as to there being a 1994 work related injury. *See* EX 1, generally. Rather, he found it impossible to distinguish between Claimant's work injury and pre-existing back condition. *Id.* at 18.

EX 21 at 11; August 20, 1998 Hearing Transcript at 48, 80. Dr. Henrickson testified that this area will remain irritated for the rest of Claimant's life or it will go numb. *Id.* at 48.

Dr. Robert O. Gordon

Dr. Gordon is a board-certified orthopedic surgeon. EX 57 at 1; EX 91 at 7-8. However, Dr. Gordon has no specific fellowship training in back surgery. *Id*. He testified that his elective surgery experience has been in the area of joint replacement surgery. CX 17 at 9-10. He also admitted that his subspecialty is in hips and knees, rather than the back, and that he refers patients to other doctors for back surgery. *Id*. at 9, 12.

Dr. Gordon saw Claimant on October 3, 2000. EX 43 at 1-3. He made note of Claimant's subjective reports of lower back pain but asserted he could find no physiological explanation for the reported pain and emphasized the disparity between Claimant's reports of pain and his objective findings. EX 43 at 2; EX 44 at 1; EX 91 at 13-14. On November 2, 2000, Dr. Gordon issued a report based on the examination of Claimant and a review of medical records. EX 44. He noted Claimant has spondylolisthesis that existed prior to her initial injury of October 15, 1993. EX 44 at 1. Notwithstanding Claimant's report that her back pain was occasional prior to the 1993 injury and that its severity increased significantly after that injury, Dr. Gordon found no evidence of permanent aggravation of the preexisting spondylolisthesis. *Id.* He wrote that it was "not unreasonable to offer a patient with spondylolisthesis and pain complaints a surgical procedure" but that the surgery was unrelated to Claimant's work-related injuries which he considered at most a temporary aggravation of the spondylolisthesis. *Id*. He categorically asserted that the surgery and any ongoing treatment were unrelated to "any anatomical abnormalities caused by or permanently aggravated her work-related injuries." In the November 2, 2000 report, he did not refer to or address Claimant's work-related cumulative injury of February 1, 1994. *See id*., generally. He concluded the October 15, 1993 injury was a soft tissue injury, the kind of which should resolve fully within three months. *Id.* at 1; EX 91 at 17-18. In his deposition of December 15, 2003, Dr. Gordon categorically denied a causal connection between Claimant's chronic lower back symptoms and the injury of February 1, 1994. He found no cumulative or otherwise causal connection between Claimant's physical condition and the months of strenuous inventory work Claimant engaged in prior to the February 1, 1994 injury. EX 91 at 19-21.

Dr. Gordon repeatedly emphasized that Claimant's subjective reports of pain were disproportionate with his objective findings. EX 43 at 2-3; EX 52 at 1; EX 91 at 14-15. He attributed this to Claimant's psychological problems and to his belief that Claimant reports she is in pain to obtain addictive pain medication. EX 91 at 14-15. Dr. Gordon admitted he has no expertise in diagnosing and treating psychological problems as he is not a psychiatrist. He noted the impression, however, that Claimant is malingering (falsely reporting symptoms) in some ways, and that she mistakenly believes that she suffers from an injury. *Id.* Because of the lack of expertise Dr. Gordon possesses in this area, he noted in his report on April 2, 2002 that he could not estimate the impact of her psychological problems on her ability to perform work. EX 52 at 1.

On February 12, 2004, Dr. Gordon was deposed regarding the neurological findings of an EMG that took place in 1996. Dr. Gordon testified that an EMG study on August 15, 1996 (found at EX 20) did not show evidence of compression of the nerve roots that serve the legs. EX 105 at 8, referring to EX 20 at 3. Dr. Gordon noted changes were found in the posterior rami of the nerves that run to the muscles in the lower back. He stated these were mild changes in the nerves and that they were consistent with the first major surgery Claimant received, a fusion, but that they also were consistent with spondylolisthesis absent any injuries. *Id.* at 9. He noted the study did not show evidence of radiculitis or radiculopathy in the nerves running down the leg. *Id.* Dr. Gordon is not a neurologist and did not directly comment on the diagnosis by the neurologist that completed the EMG, Dr. Thomas M. McNorton. EX 20 at 1-2. Dr. Norton diagnosed Claimant with left L-5, S-1 polyradiculopathy, mild. *Id*. at 3.

As for the reduction in pain that Claimant experienced after the second surgery, Dr. Gordon commented in his report on April 2, 2002 that he found this improvement to be significant: "This patient looks like a totally different person than when I saw her on 10/03/00." EX 52 at 1. He again expressed a belief that her subjective reports of pain were non-proportional to objective findings. *Id.* Dr. Gordon expressed his belief that Claimant's situation was improved largely due to her getting off of addictive pain medication. *Id.* He stated, "Her physiological problem has been taken care of and I suspect her psychological situation is much improved as well," opining that this was probably due to Claimant "having gotten herself off of all addicting pain medication." *Id.*

From a strictly orthopedic point of view, Dr. Gordon testified that Claimant had the physical capacity for full-time employment in light or sedentary work activity. CX 17 at 73; EX 43 at 3. He also testified that strenuous activity could cause instability, which would in turn make Claimant more likely to be symptomatic. CX 17 at 33-34.

Dr. Lawrence Foltz

Claimant's former treating provider, Dr. Lawrence Foltz, is board-certified in family practice. EX 70 at 1. In a one-sentence letter of accord dated May 19, 2003, Dr. Foltz indicated that as Claimant's former treating physician he did not find any reason to disagree with the opinions of Dr. Gordon, Dr. Schulman, or Dr. Rosenbaum. *Id.* at 3. He reviewed the reports of all three physicians. *Id.* at 2 (indicating Dr. Foltz reviewed reports found at: EX 43; EX 44; EX 45; EX 46; EX 47; EX 52; and EX 59). Those reports primarily addressed the following subject areas. On October 3, 2000, Dr. Gordon issued a report concerning whether Claimant can work and whether her medical care was reasonable and necessary. EX 43 at 2. On November 2, 2000, Dr. Gordon issued another report concerning Claimant as to causation, but it only referred to the injury of October 15, 1993. EX 44 at 1. He did not refer to or address causation of the injury at issue in this case, the injury of February 1, 1994. *See id*., generally. Similarly, the April 2, 2002 report by Dr. Gordon notes Claimant's reports of lower back pain were disproportionate to Dr. Gordon's objective findings but the report does not refer to the February 1, 1994 cumulative stress injury. EX 52 at 1-2. On December 21, 2000, a one-sentence letter of accord was issued by Dr. Mason concerning whether Claimant could work. EX 45 at 1. The psychiatric evaluation by Dr. Schulman addresses whether Claimant's psychiatric problems relate causally to the work injuries. EX 46 at 20. On January 23, 2001, Dr. Schulman issued a follow-up report on the same

subject matter. EX 47 at 1-3. Dr. Rosenbaum's report on March 26, 2003 makes mention of the February 1, 1994 injury but does not address it directly and instead focuses on the etiology of Claimant's psychiatric diagnoses. *See* EX 59 at 9, 21; *see also id.*, generally.

Claimant was seen by Dr. Foltz more than three dozen times in the period from January 9, 1991 to May 25, 1993. Dr. Foltz's medical records prior to Claimant's work related injuries only occasionally mention lower back complaints, and they are not noted to have been debilitating. EX 12 at 4-6, 11. In the two years prior to Claimant's work related injuries, Dr. Foltz saw Claimant 38 times. *Id*., 1-15. Two of those entries refer to the spondylolysthesis diagnosis. *Id*. at 4, 7. The other three entries refer to injuries to the lower back that occurred on two separate occasions, both with quick recoveries. *Id*. at 5-6, 11. On one occasion Dr. Foltz refers to an ongoing hip problem that he does not relate to the lower back or to spondylolysthesis. *Id*. at 9. On five other occasions, he refers to complaints of neck, upper back, and mid-back problems that he does not relate to the lower back or to spondylolysthesis. *Id*. at 11-15.

Dr. Thomas Jay Rosenbaum

Dr. Rosenbaum is a board-certified neurosurgeon. EX 60; CX 18 at 15. He testified in his deposition that he had reviewed Dr. Gordon's deposition. CX 18 at 70-74; EX 91. On March 20, 2003, Claimant was examined by Dr. Rosenbaum. EX 59. Claimant reported left lower back pain. *Id.* at 3. In his medical report, Dr. Rosenbaum agreed with Dr. Gordon's conclusion that Claimant's work injury did not cause her pathology or significantly contribute to it. *Id.* at 5. Dr. Rosenbaum also opined Claimant's surgical and intervening treatments had been directed at her preexisting spondylolysis and spondylolisthesis rather than at any work related injury. *Id.* at 5. On April 14, 2003, Dr. Rosenbaum re-evaluated Claimant and made no change to his initial assessment. EX 63 at 3. Similarly, in a deposition on December 24, 2003, Dr. Rosenbaum stated he had not changed his opinions from his prior assessments. CX 18 at 8. Dr. Rosenbaum opined that Claimant's 1994 work related injury did not cause her ongoing back problems and that these instead are related to her pre-existing spondylolysthesis. EX 102 at 1. He testified that he found Claimant's medical records show she had significant chronic pain before her initial injury. CX 18 at 64. Dr. Rosenbaum points to a Naval Medical Clinic record from September 2nd, 1993 that prescribed Tylenol No. 3 "for chronic hip pain on disability." *Id.* at 7, referring to EX 11-14 and EX 83-87. He also testified that the hip pain was "probably in retrospect related to her back -- you know, what we call referred pain -- that's taking a narcotic -- not often, but taking a narcotic the month before her injury." CX 18 at 38.

Dr. Gregory H. Chow

Dr. Chow, a board-certified orthopedic surgeon, completed an independent medical evaluation for Employer on June 5, 1998. EX 30 at 1. Although he was not deposed, in his report Dr. Chow opined that Claimant's work related injury exacerbated Claimant's pre-existing spondylolysis and spondylolisthesis. *Id.* at 12. He does not directly address the injury of February 1, 1994. However, he specifically comments on the level of pain prior to the initial (October 1993) injury, concluding Claimant only had "some occasional pain, that was not severe enough to limit her duties or activities." *Id.*

Dr. Chow opined that Claimant would not have ongoing lower back problems if she did not have a pre-existing condition, and that she would not have those problems without the work-related injury. *Id.* He also stated that the work injury and related surgeries are "primarily responsible for her current problems." *Id.* However, Dr. Chow did not specifically address causation regarding Claimant's 1994 injury. Therefore, the most relevant aspects of Dr. Chow's report that relate to the issues in this case are his job approvals concerning the labor market surveys, discussed further below, as well as issues of psychiatric diagnosis and treatment. Dr. Chow diagnosed a failed back syndrome, Status-post L5-S1 fusion for spondylolysis and spondylolisthesis, possible complete fusion of the left side L5-S1, Chronic Pain Syndrome, and possible Bipolar Disorder. *Id.* at 11. Dr. Chow recommended Claimant receive chronic pain management and physiatry, as well as psychiatric care, emphasizing the latter to be the most important form of treatment for Claimant. *Id.*

Psychological and psychiatric assessments

One year after Claimant saw Dr. Chow, she was seen at a military outpatient clinic, Behavioral Healthcare. Claimant was diagnosed with Axis I, Pain Disorder, Associated with Psychological Factors and a General Medical Condition and Axis III, Chronic Pain in Lower Back. EX 37 at 1; EX 38 at 1 (utilizing the Diagnostic and Statistical Manual of Mental Disorders, IV). Similarly, two years later, treating psychologist Dr. Decker diagnosed Claimant with Acute Stress Disorder, Sexual Dysfunction, and Medically Induced Depression related to Failed Back Syndrome. EX 47 at 2.

Dr. Schulman, who is board certified in psychiatry and neurology, is an expert on chronic pain syndrome as well as worklessness, which he states is a condition whereby being out of work in itself creates, over time, a psychological impairment. CX 19 at 12, 18-20. He completed an independent psychiatric evaluation of Claimant on November 27, 2000, diagnosing her with Bipolar Disorder, Premenstrual Mood Disorder and Psychogenic Pain Disturbance. EX 46 at 20. He concluded that all three psychiatric disorders were preexisting conditions and none were causally related to Claimant's work related injuries. *Id*. Dr. Schulman was deposed on January 16, 2004. CX 19 at 12. He testified that he believes Claimant has had psychiatric problems throughout much of her life. *Id.* at 30. Based on review of records and a clinical exam of Claimant (*Id.* at 30-31), he diagnosed Claimant with Axis I, Bipolar Disorder, rapid cycling; Psychogenic Pain Disturbance; Preluteal Phase Mood Disorder, and Axis III, Personality Disorder, Cluster B personality - histrionic and borderline characteristics. *Id.* at 30 (utilizing the Diagnostic and Statistical Manual of Mental Disorders, IV). He opined that Claimant had instability in her work history and claimed that the Psychogenic Pain Disorder preceded Claimant's work related injuries. *Id.* at 31, 35. Dr. Schulman explained that the diagnosis of Psychogenic Pain Disturbance is based on Claimant's subjective report of pain which he finds to be disproportionate with objective findings. *Id.* at 32. He also stated that the psychiatric problems are not caused or aggravated by her various injuries. *Id*. at 76. Dr. Schulman claims that Claimant's pre-existing mental health diagnoses create an inherent risk of psychiatric instability that have been disabling to her, historically. *Id*. at 35. He opined that Claimant was not stable in her work prior to the 1993 and 1994 injuries. *Id.* at 35. Dr. Schulman testified that Claimant's inherent psychiatric instability manifested itself as disability prior to 1992 before any

work related injuries; that Claimant's history reflects significant problems functioning throughout her adult life; that Claimant has not sustained a period of employment for more than three or four months; and that her longest period of employment was for Employer for four months. *Id*. at 35.[4] Notably, Dr. Schulman's report opines not that Claimant has no psychological work restrictions, but that her psychological diagnoses would generally not bar to her from performing work. CX 19 at 73; EX 46 at 21. He stated also that at a given point in time when Claimant is less than stable psychiatrically she might not at that point be capable of working. CX 19 at 88.

Summary of Labor Market Surveys

Three vocational experts conducted labor market surveys. A survey of the Oahu, Hawaii area, where Claimant lived at the time, was completed on June 5, 1998 by Donald Kegler, with a follow up report on September 2, 1998. EX 10; EX 127; EX 128. Barbara K. Byers submitted a retroactive labor market survey on May 20, 2003, covering the period from August 1, 1999 to June 1, 2002. EX 71 at 1; CX 21 at 26. Scott Stipe performed labor market surveys on May 14, 2003, and on January 2, 2004. EX 61 at 1; EX 96; EX 98. Claimant argues that the deposition testimony of Donald Kegler and that of Barbara Byers were improperly influenced by counsel for Employer due to inappropriate communications sent by Employer's Counsel to Mr. Kegler and Ms. Byers about the content of their testimony prior to their respective depositions.[5]

June 5, 1998 Labor Market Survey by Donald Kegler

A labor market survey was performed on June 5, 1998 by Donald Kegler, M.Ed., C.R.C.[6] EX 10; EX 128. The jobs in the survey were identified utilizing physical functional capacity information provided to Mr. Kegler by Employer, but Claimant was not contacted or interviewed. EX 127, 128. In addition, Mr. Kegler utilized work restrictions that were three years old. CX 22 at 14; EX 116 at 1; EX 117A at 1; EX 128 at 1 (identifying Dr. Kahanovitz's 1995 work restrictions as those utilized for developing the criteria for the job search). He also received from Employer some educational and vocational history information, learning Claimant has word processing skills and can drive. EX 128 at 2. He testified that he did not assess

[4] Dr. Schulman's statements are contradicted by Employer's vocational experts who gathered a detailed work history of Claimant. Vocational expert Scott Stipe met with Claimant and reviewed her written work records that indicate that both before the work related injuries Claimant tended to hold jobs for 1-3 years on average, tending toward approximately two years in length, with no significant periods of unemployment noted. EX 61 at 5. Vocational expert Barbara Byers gathered this work history as well. EX 71 at 3.

[5] In the second paragraph of a fax dated April 25, 2006, counsel for Employer stated the following to Mr. Kegler concerning Mr. Kegler's testimony in an upcoming deposition by Claimant's counsel: "I think all you need to say is that (1) Dr. Shulman (sic), the only psychiatrist to see {Claimant} gave her no work restrictions, (2) Dr. Taylor (Claimant's counsel's IME semi-retired neurosurgeon) approved cashier jobs with breaks and your jobs are no more stressful mentally then (sic) cashier jobs, and indeed you had one cashier job, (3) your jobs are similar to the jobs the Judge found were appropriate for the Claimant and (4) your jobs are appropriate with someone with bipolar disorder, prememstrual (sic) mood disorder, and psychogenic pain disorder, since they are within her work restrictions and are not stressful jobs." CX 23. Similarly, Employer's Counsel also sent a virtually identical email to Ms. Byers on April 25, 2006, the text of which appears to have been taken from the fax sent to Mr. Kegler by Employer's Counsel on that same date. The survey dates and geographic locations applicable to Mr. Kegler were crossed out and replaced with the details applicable to Ms. Byers' survey. CX 24.

[6] Employer erroneously refers to Mr. Kegler as "Dr. Kegler" but Mr. Kegler does not attempt to identify himself as such. *See* Employer's Post-hearing Brief at 3, 42; *see also* Mr. Kegler's Curriculum Vitae, EX 22, Appendix 1 at 3-4.

Claimant directly because he had no means of contacting her. CX 22 at 13-14. Mr. Kegler also completed a final report on September 2, 1998 which indicated he had corresponded with Claimant's treating physicians and an independent medical expert. EX 127 at 1. He sent the list of jobs from his survey of June 5, 1998 to Drs. Chow, Liem and Hoffman for approval or rejection of the positions listed in the survey. CX 22 at 14-15. The doctors reviewed the positions as they related to Claimant's physical limitations, but no doctor or other expert reviewed the jobs for whether they are appropriate given Claimant's psychological problems. *Id.* at 16.

The September 2, 1998 report by Mr. Kegler stated that three of the four jobs identified in the labor market survey were approved by treating physicians, but the report did not identify which three jobs. *Id.* Job approval forms submitted by Mr. Kegler to treating providers and employer's expert were completed in July and August of 1998. Orthopedist Dr. Gregory H. Chow approved the following four positions: Receptionist; Sales Clerk; Reservations Agent; Rental Service Agents. EX 116 at 2, 4, 6, 7, 9. Dr. Chow, an independent medical evaluator (CX 22 at 17), disapproved the positions of Merchandiser, Shuttler, and Customer Service Representative (due to physical activities that are too vigorous, including frequent bending, twisting, and stocking shelves). EX 116 at 3, 8, 10. He conditionally approved the Telemarketer position if Claimant were able to take mini-breaks to stand up rather than sitting the whole time. EX 116 at 3, 5, 8, 10. Treating provider Dr. Leon Liem (CX 22 at 17) approved all positions without comment. EX 117 at 1-9; 117A at 3-6. Treating provider Lieutenant Commander Lori Hoffman, M.D. (CX 22 at 17; EX 30 at 5) also approved all of the listed positions without comment. EX 10 at 2-11.

Mr. Kegler knew of Claimant's psychiatric problems from the review of Claimant's medical records. *Id*. at 17. For example, Mr. Kegler opined that Dr. Schulman's report did not include psychological restrictions, so he did not consider any psychological restrictions. *Id*. at 37.[7] Mr. Kegler apparently did not have access to Dr. Chow's report, including the notation that psychiatric factors are considerable and that psychiatric treatment is the most important treatment Claimant should receive. Mr. Kegler was not instructed to consider psychological factors nor did he meet with Claimant to assess any such factors. *Id.* at 22. He testified that unless he meets with and assesses an individual he cannot determine whether psychological problems that are recorded in medical reports could currently impact the individual in terms of her job functioning. *Id.* at 18, 22. Mr. Kegler also testified that had he met with Claimant, it would have been beneficial in order to assess her for emotional problems and/or drug-seeking behaviors that could be an issue in workplace performance. *Id.* at 19-20.

Retroactive Labor Market Survey by Barbara Byers for the period of August 1, 1999 through June 1, 2001

Vocational expert Barbara K. Byers submitted a retroactive labor market survey on May 20, 2003, covering the period from August 1, 1999 to June 1, 2002. EX 71 at 1; CX 21 at 26. As noted above, on April 25, 2006 Ms. Byers received an e-mailed statement from Employer's

[7] Dr. Schulman noted that Claimant's psychiatric diagnoses would generally not bar to her entirely from performing work. CX 19 at 73; EX 46 at 21. He stated also that "at any given time" if Claimant is less than stable psychiatrically she might not at that point be capable of working. CX 19 at 88.

Counsel, with virtually the same content as that contained in the fax from Employer's Counsel to vocational expert Mr. Kegler. This e-mail concerned the content of Ms. Byers' upcoming deposition testimony. CX 21 at 56. However, Ms. Byers denied this communication impacted her opinion regarding Claimant. She testified in her July 19, 2006 deposition that her opinion remains the same as when she formed it in 2003. *Id.*

For the retroactive labor market survey, Ms. Byers relied upon Claimant's response to interrogatories and request for production dated November 3, 2000, records of Claimant's physical therapy, records from the National Naval Center, the evaluations and medical records of Drs. Schulman, Mason, Gordon and Kahanovitz, and the records of Stan Scher, CRC, CPC. *Id.* Ms. Byers noted some doctors approved sedentary work, while others allowed light duty; in addition, many doctors opined Claimant could do full-time work while others limited her work to part-time only. *Id.* at 26. Ms. Byers decided to cover all of these different contingencies by searching for jobs requiring sedentary or light duty, and listing both part- and full-time positions. *Id.* at 26-27.

Ms. Byers utilized work restrictions set by Dr. Gordon in 2002. EX 71 at 4. In turn, on June 4, 2003, Dr. Gordon approved the jobs in Ms. Byers' retroactive labor market survey but conditioned this on "assuming no post-surgical complications returned (see report of 4/2/02)" (EX 72 at 2).[8] Dr. Gordon's contact with Claimant and her medical records was as follows. Dr. Gordon first saw Claimant on October 3, 2000 (EX 43 at 1-3), nearly a full year after the first year of the labor market survey period. On November 2, 2000, Dr. Gordon issued a report based on the examination of Claimant and a review of medical records. EX 44 at 1. He subsequently saw Claimant at the end of the relevant time period, on April 2, 2002 (EX 52 at 1). Dr. Gordon was again deposed on December 15, 2003. EX 91. He was deposed on February 12, 2004 (EX 105) and again on April 29, 2004 (CX 17) after reviewing medical records.

Ms. Byers admitted at her deposition that she did not review or even receive medical data as to whether Claimant was medically available for work at the time of the second surgery in May 2001 and the subsequent recovery period. She knew that Claimant had the surgery but received no work restrictions for Claimant for May 2001 and so she surveyed jobs available at that point. CX 21 at 23. Ms. Byers relied on two pieces of data to assess for psychological concerns or limitations. She reviewed the 1995 psychological testing report by vocational expert Stan Scher, which indicated at the time that Claimant had no cognitive problems that would interfere with her work functioning. CX 21 at 79; EX 71 at 3. Ms. Byers also reviewed Dr. Schulman's independent psychiatric evaluation from November 2000. EX 46. Ms. Byers testified that she did not contact Dr. Decker, who was Claimant's treating psychologist during the period of time Ms. Byers surveyed Claimant. CX 21 at 79. In addition, Ms. Byers never met Claimant to assess her directly. She testified that although she prefers to meet with an individual to develop the criteria for the survey, and always asks to meet the individual being surveyed, this

[8] Thus, Dr. Gordon conditioned his job approvals on Claimant's medical status at the time that the jobs were available. In Dr. Gordon's report of April 2, 2002, he noted it would be reasonable to check with Dr. Mason, the orthopedist who performed Claimant's surgery, to make sure that the fusion is healing well, and that if it is Claimant has the capacity to resume light or sedentary work. EX 52 at 2. Similarly, on December 2, 2003, Dr. Gordon issued a report concerning his review of Scott Stipe's jobs. Dr. Gordon conditioned his approval on Claimant's second surgery successfully stabilizing her ("assuming she has had solid fusion"). EX 90 at 1.

was not possible. *Id.* at 13. Although Ms. Byers does not recall the particulars of why Employer did not provide her with Claimant's contact information, she testified that she had no way of getting in touch with Claimant. *Id*. at 13-14, 18, 48.

May 14, 2003 and January 2, 2004 Labor Market Surveys by Scott Stipe

Mr. Scott Stipe conducted a labor market survey of Claimant's residential area in and around Milwaukie, Oregon on May 14, 2003, where Claimant lived at the time. EX 61 at 1. In preparation for the survey, Mr. Stipe met with Claimant and her husband on April 15, 2003. *Id*. In addition to gathering Claimant's vocational and medical history and assessing Claimant's mental and physical capabilities, Mr. Stipe gathered data from Claimant and her husband regarding her psychological functioning. *Id*. at 3. Mr. Stipe reported that Claimant told him that after the first surgery her lower back pain got worse. *Id*. at 2. Mr. Stipe also noted that Claimant stated that while she was living in Hawaii in 1997 she began to have psychological problems related to her pain. *Id*. at 3. He noted that when Dr. Schulman assessed Claimant on November 27, 2000, Dr. Schulman noted Claimant's psychological problems would not entirely preclude her from being able to work. *Id*. at 3, referring to EX 46 at 21. He also reviewed Dr. Schulman's addendum report of January 23, 2001 which Dr. Schulman wrote upon reviewing Claimant's records of mental health treatment subsequent to the work related injuries. *See* EX 61 at 2, referring to report located at EX 47. In addition, Mr. Stipe reviewed the following records: the labor market survey by Mr. Kegler; Dr. Gordon's reports from October 3, 2000, November 2, 2000 and April 2, 2002; the Decision and Order of March 23, 1999; Claimant's response to Employer's first set of interrogatories on November 3, 2000; writings by Dr. Brian Mason including a medical sources statement on September 19, 2000, correspondence on December 21, 2000 and a report on May 22, 2001; physical therapy chart notes from Therapeutic Associates; Dr. Rosenbaum's evaluation on March 26, 2003 and correspondence on April 14, 2003; and a concurrent letter signed by Dr. David Adler on April 9, 2003; vocational counselor Stan Scher's performance and psychological testing report from 1995. EX 61 at 2-3, 8-9. On December 31, 2003, Mr. Stipe issued an addendum report (EX 96) and then issued an additional addendum, including additional job listings, on January 2, 2004. EX 98.

Mr. Stipe provided employers with information of Claimant's work history, education level, and physical restrictions. EX 61 at 3-4. The work restrictions utilized by Mr. Stipe included: "able to do sedentary/light work (20 pounds occasional, 10 pounds frequent lifting, limited bending, must be able to change positions from sitting to standing/walking frequently)." Mr. Stipe did not include in his labor market survey the specific job requirements or qualifications for each job listed, but each employer reviewed the work restrictions and opined that Claimant met the specific job requirements. According to Mr. Stipe, the positions identified in his report were within Claimant's physical limitations, comported with her educational and vocational background, and were locally available. EX 61 at 9-10; EX 96 at 1-2; EX 98 at 3. The labor market surveys included the following positions: Telemarketer; Appointment Setter; part-time Fundraiser; Market Researcher; Cashier; Parking Lot Attendant (part- and full-time); Security Guard; Gate Guard; Tow Truck Operator; Front Desk Clerk; Motel Clerk. A total of 22 employers were listed as hiring for these types of positions. EX 61 at 10-22; EX 98 at 1-2.

CONCLUSIONS OF LAW

The Act is construed liberally in favor of injured employees. *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *J. B. Vozzolo, Inc. v. Britton,* 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the true-doubt rule, which resolves factual doubt in favor of the claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. *Director, OWCP v. Greenwich Collieries,* 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3d Cir. 1993). In arriving at a decision in this matter, it is well settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners or other expert witness. *Duhagon v. Metropolitan Stevedore Company*, 31 BRBS 98, 101 (1997); *Avondale Shipyards, Inc. v. Kennel,* 914 F.2d 88, 91 (5th Cir. 1988); *Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce,* 551 F.2d 898, 900 (5th Cir. 1981); *Bank v. Chicago Grain Trimmers Association, Inc.,* 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

Causation

Section 20(a) of the Act creates an initial, rebuttable presumption that a claimant's disabling condition is causally related to his employment. 33 U.S.C. §920(a); *American Stevedoring Ltd. v. Marinelli*, 248 F.3d 54, 64 (2d Cir. 2001). An employer may break the presumptive link with substantive evidence that severs the presumed causal connection between the injury and Claimant's employment. *American Stevedoring Ltd.*, 248 F.3d at 65. To break the causal link between the accident and aggravation of a prior condition, the employer must provide substantial evidence that the accident neither caused nor aggravated the condition. *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 689 (5th Cir. 1999). If the employer meets that burden, then the presumption falls out of the case and the issue of causation must be resolved based on the evidence as a whole. *American Stevedoring Ltd.*, 248 F.3d at 65. In that event, all relevant evidence is weighed to determine if a causal relationship has been established, with the claimant bearing the ultimate burden of persuasion by a preponderance of the evidence. *Id.*; *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 280, 28 BRBS 43(CRT) (1994).

A work related aggravation of a pre-existing condition constitutes a work related injury pursuant to section 2(2) of the Act. *Gardner v. Bath Iron Works Corp*., 11 BRBS 556 (1979), aff'd sub nom., *Gardner v. Director, OWCP*, 640 F. 2d 1385 (1st Cir. 1981); *Preziosi v. Controlled Industries*, 22 BRBS 468 (1989). Moreover, the work related injury need not be the sole cause or primary factor in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with, or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. *Strachan Shipping v. Nash*, 782 F.2d 513 (5th Cir. 1986); *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989).

Employer's medical experts provided substantial evidence to break the presumed causal link, so the task upon remand is to consider the medical evidence as a whole in terms of causation, including a detailed discussion of conflicting medical opinions. I have weighed all the evidence in light of the case law set forth and find that for the reasons discussed below Claimant

has established that she suffered a cumulative industrial injury on February 1, 1994, while working for Employer, and also suffered injuries caused by the two major surgeries she received for that injury. I also conclude based on reasons discussed below that Claimant's psychiatric conditions were caused or aggravated by her work related injury of February 1, 1994 and the related harm caused by the two surgeries.

February 1, 1994 cumulative injury

Dr. Taylor, a board-certified neurosurgeon (CX 8 at 37), saw Claimant on December 19, 2003. CX 15 at 1. He was deposed on February 3, 2004. CX 20 at 1. His practice is evenly split between treating patients in an outpatient setting and completing medical examinations for worker's compensation cases. CX 20 at 7. He specialized for forty years in spinal surgery, primarily lumbar surgery. *Id.* at 7-8. Six years ago, he retired from his spinal surgery practice but continued practicing on an outpatient basis. *Id.* at 7. Prior to that, he estimates that approximately ten percent of the spinal surgeries were fusions. *Id*. at 8. Notwithstanding Employer's claim to the contrary, I find Dr. Taylor has adequately developed expertise in neurological problems related to the spine as well as expertise in spinal surgery.

Dr. Taylor testified by deposition that he diagnosed Claimant with a congenital defect called spondylolisthesis and lolysis. *Id*. at 42. He also diagnosed Claimant with chronic pain syndrome secondary to the initial trauma and failed surgery, with a resulting depression and other related psychological factors. *Id.* at 42, 44, 73, 112. Dr. Taylor testified in his deposition that medicine has not advanced to the point where the exact problems related to an individual's spondylolisthesis and pseudoarthrosis can easily be pinpointed. *Id.* at 14. Therefore, it is difficult to measure objectively exactly what aspect of Claimant's condition may be generating the pain she is experiencing. *Id.* at 14-15. I find this to be an adequate explanation as to why Claimant's subjective complaints may not correlate perfectly, or even closely, to objective medical data.

Prior to the injuries while working for Employer, and prior to the injury that she experienced as a Marine recruit, Claimant had no symptoms from the spondylolysthesis, nor did she even know she had the condition. Dr. Taylor noted Claimant learned of the condition only when she was injured as a Marine recruit while scrubbing a floor extensively, which brought on back pain. *Id.* at 15. She received an x-ray and was diagnosed with the condition. *Id.* She experienced some pain intermittently but received very little treatment other than pain medication when needed. *Id.* at 16. The pain was minimal and non-debilitating. *Id.* Claimant experienced a significant change in her functioning and pain levels in her lower back after the work related injuries, changes which Dr. Taylor found to be permanent. As a result of his review of the records and a clinical examination of Claimant, Dr. Taylor concluded that the February 1, 1994 work related injury caused permanent injuries to Claimant's lower back.

I find Dr. Taylor's opinion credible. It is supported by the medical records of Claimant's treating physician. Dr. Taylor notes that these records reflect how minimal and non-debilitating Claimant's back pain was prior to the 1993 and 1994 work related injuries. EX 12 at 4-15. Dr. Taylor supported this opinion with significant detail in his testimony. He discussed how Claimant's injuries impacted her functioning and pain levels. *Id.* Prior to the initial injury of

October 15, 1993, Claimant did not have significant pain and was able to work. *Id.* She merely experienced intermittent pain that did not debilitate her or require extensive treatment. *Id.* at 15-16. She only received pain medication on occasion. *Id.* Following the October injury, Claimant experienced some pain, yet it was not debilitating and she kept working, receiving some pain medication. *Id.* After the February injury, Claimant experienced a significant increase in her pain and was unable to work. *Id.* For these reasons, I accord significant weight to Dr. Taylor's opinion that the February 1, 1994 injury caused permanent and significant changes to Claimant's lower back.

For similar reasons, I accord significant weight to Dr. Taylor's opinion that Claimant's condition was worsened by surgery. The first surgery, a fusion on July 6, 1994, initially resulted in improvement but then deterioration thereafter. *Id.* at 21, 26. Dr. Taylor stated that this is not uncommon with back surgery and he attributes the deterioration to a failure to heal properly as well as to spinal instability. *Id.* These problems and the pain associated with them lead Dr. Taylor to conclude that the failed 1994 surgery worsened Claimant's condition. *Id*. This is supported by the findings of other doctors that Claimant developed left-sided sciatic syndrome after the first surgery and a mild polyradiculopathy at the L5-S1 levels on the left side. *Id*. at 32, 58. The second surgery, on May 22, 2001, was a decompressive laminectomy and a reinforced re-fusion to eliminate the instability. *Id*. This initially resulted in improvement but was, as with the first surgery, followed by some deterioration with reports of pain by Claimant in November 2002. *Id.* at 35-36. Although Dr. Taylor diagnosed Claimant with nerve problems from the first surgery, which were detected by an EMG in 1996 five years prior to the second surgery (*Id*. at 32, 58), Dr. Taylor attributes Claimant's nerve pain also to the second surgery. *Id.* at 33-34. He opined that the second surgery may have produced further pain in Claimant due to the following: removal of bone; implantation of reinforcing hardware; scarring; nerve interruption with possible pain-producing neuromas. *Id*. at 33-34. He testified that the latter would be a likely source, at least in part, of Claimant's chronic pain. *Id*. at 34-35. Based on the medical evidence, I conclude Dr. Taylor's opinion is credible as to the harm caused by the February 1, 1994 injury as well as the harm caused by both surgeries.[9]

Similarly, Dr. Henrickson, a board-certified neurosurgeon (EX 1 at 6), opined that Claimant's 1994 work accident caused significant injury and that she suffered from an ongoing nerve root irritation due to not only the pre-existing spondylolisthesis but also due to the surgery. August 20, 1998 Hearing Transcript at 48, 80. Dr. Henrickson testified that this area will remain irritated for the rest of Claimant's life or it will go numb. *Id.* at 48. Although Judge Lesniak found Dr. Henrickson's testimony less reliable and insufficient to show that medical treatment related to the October 1993 injury was no longer reasonable or necessary, he did not conclude Dr. Henrickson's testimony lacked reliability as to the new cumulative injury. EX 1 at 18.[10] I

[9] Although Employer tries to question Dr. Taylor's credibility by claiming he lacks expertise, I find little basis for this. Dr. Taylor's part-time practice is evenly split between treating patients in an outpatient setting and completing medical examinations for worker's compensation cases. CX 20 at 7. He specialized for forty years in spinal surgery, primarily lumbar surgery. *Id.* at 7-8. Six years ago, he retired from his spinal surgery practice but has continued practicing on an outpatient basis. *Id.* at 7. Prior to that, he estimates that approximately ten percent of the spinal surgeries were fusions. *Id*. at 8. I therefore find Employer's attack on Dr. Taylor's expertise without basis.

[10] Judge Lesniak never specifically ruled that Dr. Henrickson was wrong as to there being a 1994 work related injury. Rather, he found it impossible to distinguish between Claimant's work injury and pre-existing back condition. *Id.*

find Dr. Henrickson's testimony particularly salient given that he was Employer's expert and yet based on the medical data he arrived at similar conclusions as Claimant's medical expert, Dr. Taylor. I find that Dr. Henrickson's opinion further supports the conclusion that the February 1, 1994 work related injury and subsequent surgery caused permanent harm to Claimant's lower back.

In contrast, I accord little weight to Dr. Gordon's opinion that Claimant's lower back complaints are primarily related to malingering, a mistaken belief she suffered an injury and medication-seeking. Dr. Gordon does not appear to possess expertise in diagnosing substance abuse or in determining whether an individual is seeking medication due to an addiction. *See* Dr. Gordon's Curriculum Vitae, EX 57, generally. In fact, Dr. Gordon lacks specialized training in the areas that would qualify him to opine as an expert on these matters: mental health, substance abuse, and back surgery. Notably, because of the lack of expertise Dr. Gordon possesses in this area, he noted in his report on April 2, 2002 that he could not estimate the impact of Claimant's psychological problems on her ability to perform work. EX 52 at 1. Moreover, although Dr. Gordon is a practicing, board-certified orthopedic surgeon (CX 57), he has no specific training in back surgery and his elective surgery experience over the last number of years has been in the area of joint replacement surgery. CX 17 at 9-10. He admitted that his subspecialty is in hips and knees, rather than the back, and refers patients to other doctors for back surgery. *Id*. at 9, 12. In addition, Dr. Gordon is not a neurologist. *See* CX 57, generally. He did not directly comment on the diagnosis by the neurologist that completed the EMG, Dr. Thomas M. McNorton found at EX 20 at 1-2. Dr. Norton diagnosed Claimant with left L-5, S-1 polyradiculopathy, mild. *Id*. at 3.

Dr. Gordon's opinion is particularly diminished by the fact that he fails to support his opinion as to causation with medical evidence. Strangely, he somehow believes that Claimant's lower back condition, spondylolisthesis, caused significant problems both prior to and after the work related injuries and that therefore this condition alone is the cause of any ongoing lower back problems. Yet the medical evidence does not reflect Claimant experiencing significant ongoing lower back problems prior to her work related injuries. I find that Dr. Gordon utterly fails to support his assertion that Claimant experienced debilitating pain both before and after the work related injuries and find his opinion regarding causation to be without merit. In contrast, Employer's medical expert Dr. Chow (who was not deposed) specifically commented on Claimant's level of pain prior to the initial (October 1993) injury, concluding in his report that Claimant only had "some occasional pain, that was not severe enough to limit her duties or activities." EX 30 at 12. Oddly, Dr. Foltz, Claimant's family physician, inexplicably expresses the same belief as Dr. Gordon regarding causation. Like Dr. Gordon, Dr. Foltz fails to cite any records in support of this opinion. Similar to Dr. Gordon, I find Dr. Foltz's opinion entirely lacking in credibility, given it is contradicted by Dr. Chow's report as well as by Dr. Foltz's own medical records from treating Claimant for a period of more than two years prior to the initial work related injury of October 15, 1993. *See* EX 12, generally. There is no evidence of work restrictions or any ongoing problems with Claimant's functioning, at work or elsewhere, according to Dr. Foltz' medical records. *See id*. Rather, Claimant's problems with her lower back condition were intermittent and did not, apparently, pose any significant ongoing concerns with her functioning such as those she encountered after the February 1, 1994 work related injury. Specifically, Claimant was seen by Dr. Foltz from January 9, 1991 to May 25, 1993. It

was only during five of Claimant's 38 medical visits that the record reflects a complaint concerning the lower back and/or spondylolysthesis. Two of those entries refer to the spondylolysthesis diagnosis. *Id.* at 4, 7. The remaining entries refer to two injuries to the lower back and the very quick recoveries that Claimant experienced following those injuries. *Id.* at 5-6, 11. In the entries, Dr. Foltz also refers to other medical problems which he does not relate to the lower back problem. On one occasion, Dr. Foltz refers to an ongoing hip problem (*Id.* at 9), and on five other occasions he refers to neck, upper back, and mid-back problems. *Id.* at 11-15. The entries concerning these problems do not indicate they are related to the lower back, and apparently these medical problems only arose intermittently. A medical examination by the medical board performed at the Naval Hospital on June 25, 1991 does not reflect any history of lower back complaints other than the discovery of the spondylolysthesis when Claimant was a Marine recruit. *See* EX 11 at 1-2. I conclude that the medical evidence does not support Drs. Gordon and Foltz's opinion that Claimant suffered the type of pain before the work related injuries that she experienced after those injuries, particularly the injury on February 1, 1994. Accordingly, I accord no weight to Drs. Gordon and Foltz's opinions as to causation.

Dr. Rosenbaum agreed with Drs. Gordon and Foltz that Claimant's work related injury did not cause her pathology or contribute significantly to it. EX 59 at 5. On April 14, 2003, Dr. Rosenbaum re-evaluated Claimant and made no change to his initial assessment. EX 63 at 3. In a deposition on December 24, 2003, Dr. Rosenbaum stated he had not changed his opinions from his prior assessments. CX 18 at 8. In a letter to Employer's attorney on January 21, 2004, Dr. Rosenbaum expressed agreement with Dr. Taylor's recounting of Claimant's history and medical records. EX 102 at 1. Dr. Rosenbaum also noted that he and Dr. Taylor came to opposite conclusions as to causation. *Id.*

I find Dr. Rosenbaum's opinions to be unsupported and therefore lacking in credibility. Noting he bases his opinion on medical records, Dr. Rosenbaum stated that Claimant's 1994 work related injury did not cause her ongoing back problems and that these instead are related to her pre-existing spondylolysthesis. EX 102 at 1. Similar to Drs. Gordon and Foltz, Dr. Rosenbaum testified that he found Claimant's medical records show she had significant chronic pain before her initial injury. CX 18 at 64. Dr. Rosenbaum points to a Naval Medical Clinic record from September 2nd, 1993 that prescribed Tylenol No. 3 "for chronic hip pain on disability." *Id.* at 7, referring to EX 11-14 and EX 83-87. Although it cannot be automatically assumed that chronic hip pain necessarily originated from Claimant's pre-existing spondylolysthesis, Dr. Rosenbaum apparently makes that assumption while failing to cite medical evidence to support it. He seems to believe that this one record provides adequate support to show that prior to the work related injuries Claimant had ongoing lower back problems because of the mere fact that the record reports chronic hip pain. He testified that the hip pain was "probably in retrospect related to her back -- you know, what we call referred pain -- that's taking a narcotic -- not often, but taking a narcotic the month before her injury." CX 18 at 38. I find this statement unconvincing, and find the medical evidence lacking that Claimant had any kind of chronic or significantly debilitating condition related to her lower back prior to the work related injuries. I find Dr. Rosenbaum fails to support his theory of causation that the lower back problems pre-existed the work related injuries. Accordingly, I disregard the opinions of Drs. Gordon, Foltz and Rosenbaum that Claimant's work injury did not cause the lower back pathology or contribute significantly to it. I conclude that the injury of February 1, 1994 and the

two major surgeries Claimant received for that injury either caused or contributed significantly to the lower back pathology.

Psychiatric injuries

Dr. Taylor expressed the belief that a psychological component occurred at some point for Claimant, contributing to the diagnosis of chronic pain syndrome. CX 20 at 44, 73, 112. He diagnosed Claimant with chronic pain syndrome secondary to the injuries and failed surgery, with a resulting depression and other related psychological factors. *Id*. at 42, 44, 73, 112. Dr. Taylor testified that he finds Claimant to be fully credible, and does not find Claimant was malingering or conscious about the psychological component that has exacerbated her pain problems. *Id*. at 43, 86-88. He believes that Claimant's functioning varies from day to day as is common for patients with chronic pain, stating this explains the discrepancy between her testimony and the surveillance film. *Id*. at 51-53, 87-88. Although Employer claims that Claimant's reports of pain are based on her desire to seek narcotic prescriptions, I find this to be without basis. Employer attempts to support its argument that Claimant had a pre-existing significant pain problem by claiming that her prescription received in September 1993 prior to the first work related injury was for a chronic hip pain condition. *See* Employer's Post-hearing Brief at 15, citing EX 91 at 23. Yet Employer seeks to characterize the same kind of narcotic prescription Claimant received after her work related injuries as a means of maligning Claimant's credibility. *See* Employer's Post-hearing Brief at 15, citing EX 91 at 14-15. Although Employer cites its Employer's medical expert, Dr. Gordon, as considering drug seeking behavior, even Employer does not cite Dr. Gordon as characterizing Claimant's behavior as drug-seeking. Instead, Employer notes that Dr. Gordon stated that Claimant *may* have been drug-seeking. *See id.* Based on the evidence, I find that it is possible Claimant, like many chronic pain patients, could be drug seeking but that the mere speculation of Employer's medical experts cannot support a conclusion that the basis of Claimant's medical complaints is related to drug-seeking behavior.

Employer's medical expert, Dr. Chow, diagnosed Claimant with Chronic Pain Syndrome, and possible Bipolar Disorder. EX 30 at 11. Dr. Chow indicated Claimant should receive chronic pain management; psychiatric care and physiatry. *Id.* Significantly, Dr. Chow emphasized that the most important treatment that Claimant should receive is not medical, but psychiatric, to help her deal with the chronic pain condition. *Id.*

In contrast, Dr. Schulman opined that no aggravation of psychiatric conditions occurred due to the work related injuries. Although Dr. Schulman is a psychiatrist, I find he fails to support this opinion and also fails to support his diagnoses of psychogenic pain disturbance and malingering. Dr. Schulman stated Claimant's pain is psychogenic pain, that is, pain out of proportion to objective findings. CX 19 at 32. He asserts this pain preceded Claimant's work related injuries and claims he based this opinion on a review of medical records starting with treating provider Dr. Foltz's records in 1991, due to Claimant's presentation to Dr. Foltz with a significant functional overlay to physical complaints. *Id.* However, a medical examination by the medical board performed at the Naval Hospital on June 25, 1991 does not indicate Claimant had any history of lower back complaints prior to the discovery of the spondylolysthesis when she was a Marine recruit. *See* EX 11 at 1-2. In addition, as discussed above, Claimant was seen

by Dr. Foltz over a period of more than two years preceding the injury, from January 9, 1991 to May 25, 1993. *See* EX 12, generally. As discussed above, she did not apparently experience pain problems that significantly impacted her functioning. *See id*. Claimant's lower back problems apparently were not debilitating, significant, or frequent. *See id*. at 5-6, 11. What little injury she did suffer to the lower back involved minor harm on two occasions, followed by quick recoveries. *See id.* at 5-6, 11. I find it significant that Dr. Schulman admitted he saw no record of work limitations prior to Claimant's work related injuries. CX 19 at 40-41.

Dr. Schulman further discredits his own opinion with his statement that Claimant had an unstable work history prior to work related injuries. *Id.* at 35. He stated that Claimant has not sustained a period of employment for more than three or four months, and that her longest period of employment was for Employer for four months. *Id*. Dr. Schulman's statements are directly contradicted by other evidence. A detailed work history of Claimant, developed by Employer's vocational expert Scott Stipe when he met with Claimant and reviewed her own written work records, indicates that both before and after the injury Claimant tended to hold jobs from one to three years on average, tending toward approximately two years in length, with no significant periods of unemployment noted prior to her injury. EX 61 at 5. Another vocational expert, Barbara Byers, also gathered this work history. EX 71 at 3. By any definition, it is hard to see how Claimant's pattern of work prior to her work related injuries could be construed as constituting work instability. Additional problems arise with Dr. Schulman's opinion due to the inconsistencies inherent in his testimony. For example, Dr. Schulman notes that stress impacts psychogenic pain (EX 19 at 61-62), and he notes that psychogenic pain waxes and wanes in Claimant's life with her stress levels, yet he also claims that her psychiatric problems could not have been aggravated by her various injuries. *Id*. at 76. Dr. Schulman asserts that Claimant does not experience chronic pain (*Id*. at 85) but at another point in his testimony he concedes that he does not disagree that Claimant has chronic pain syndrome. *Id*. at 43. Dr. Schulman testified he found no evidence indicating that Claimant's psychogenic pain is volitional (*Id*. at 69), but later opined Claimant is consciously fabricating her pain problems. *Id*. at 78, 80. Dr. Schulman stated that Claimant's diagnoses create an inherent risk of psychiatric instability that have been disabling to her, historically. *Id.* at 35. Oddly and without explanation or citing medical data, Dr. Schulman testified that this inherent instability manifested itself as disability prior to 1992. *Id.* Dr. Schulman provided no information to support this statement.

For the above reasons, I find that Dr. Schulman fails to support his opinions with medical evidence and so I reject Dr. Schulman's diagnoses of psychogenic pain disorder and malingering, as well as his opinion that Claimant's work related injuries are unrelated to her psychiatric condition. I find Dr. Schulman's opinion that no aggravation of psychiatric conditions occurred due to any work related injuries to be without basis. I instead conclude, based on the evidence, that Claimant's psychiatric conditions were caused or aggravated by chronic pain originating from the work related injury of February 1, 1994 and the two surgeries Claimant received for that injury.

Nature and Extent of Disability

A claimant has the initial burden to establish the nature and extent of his disability. *Trask v. Lockheed Shipbuilding and Construction Co.,* 17 BRBS 56, 59 (1985). The nature of an

injured worker's disability becomes permanent when the injury or condition reaches the point of "maximum medical improvement" ("MMI"). *James v. Pate Stevedoring Co.,* 22 BRBS 271, 275 (1989). The extent of a claimant's disability is determined by his ability to work. *Manigault v. Stevens Shipping Co*., 22 BRBS 332, 333 (1989). If a claimant meets the evidentiary burden of establishing that he is unable to perform her usual employment because of her injuries, then the evidentiary burden shifts to the employer to establish the availability of other jobs that the claimant could perform and secure. *Newport News Shipbuilding and Dry Dock Co. v. Director, OWCP*, 315 F.3d 286, 292 (4th Cir. 2002). If the employer establishes suitable alternative employment, the claimant can nevertheless prevail in establishing total disability by demonstrating that she diligently tried and was unable to secure employment. *Fox v. West State Inc*., 31 BRBS 118 (1997). The claimant must establish reasonable diligence in attempting to secure some type of suitable alternate employment within the compass of opportunities shown by the employer to be reasonably attainable and available, and must establish a willingness to work. *Turner*, 661 F.2d at 1043; *Newport News Shipbuilding and Dry Dock Co. v. Tann*, 841 F.2d 540, 543-44 (4th Cir. 1988).

Claimant concedes that she was compensated for all times off work at the time of her first surgery in 1994 and until she went back to work in 1995. She claims that she is owed temporary total disability based on $130.17 a week from November 6, 1995 through March 30, 1997. Claimant concedes no compensation is due between the periods from March 30, 1997 through May 14, 1997 because she was working during that time or at least attempting to work. She alleges an inability to work because of work related lower back pain as of May 14, 1997, asserting temporary total disability is owed from May 15, 1997 through the date of the second surgery, May 22, 2001, after which she claims she has been and remains permanently and totally disabled. Employer replies that Claimant's February 1, 1994 injury fully resolved within three months and caused no disability thereafter, and emphasizes that because Employer provided disability and medical benefits during those three months any claim for additional benefits should be denied. Employer alternatively argues that Claimant's disability ended on June 5, 1998, except for seven months of temporary total disability from May 1, 2001 to December 1, 2001, when Claimant was recovering from surgery.

As to the nature of Claimant's disability, in the Decision and Order of November 16, 2004, the undersigned considered the medical evidence pertaining to the permanency of Claimant's lower back condition and concluded that the evidence established the date of maximum medical improvement ("MMI") as March 20, 2003.[11] Regarding the extent of Claimant's disability, the medical evidence established that Claimant could not maintain her usual employment following the injury in February of 1994. CX 20 at 21. Accordingly, the evidentiary burden shifts to Employer to prove Claimant was capable of working in suitable alternative employment from May 21, 2002 to July 6, 2003. *See Trask,* 17 BRBS at 59.

[11] *See* Decision and Order at 20. Although Dr. Rosenbaum failed to support his opinion regarding causation, as discussed above, I find that Dr. Rosenbaum's opinion concerning MMI is supported by the medical evidence. In his report, Dr. Rosenbaum opined that maximum medical improvement occurred on March 20, 2003, and explained that prior to that date Claimant had received, over the course of nearly ten years, extensive physical therapy, steroid injections, and two surgeries. EX 59 at 2-3, 5. , Dr. Rosenbaum concluded Claimant would not benefit from further diagnostic studies or therapeutic measures. *Id*. at 5.

Appropriate labor market[12]

Determination of the relevant labor market should reflect the Act's emphasis on the economic consequences of a job-related injury, so that focus of the availability of employment should generally be on the job market where the claimant presently lives rather than where he or she resided at the time of the injury, provided that the move was motivated by a legitimate purpose. *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 382 (4th Cir. 1994).

For the following reasons, I find that the appropriate labor market was identified in each labor market survey. Mr. Kegler performed the June 5, 1998 labor market survey for Oahu, Hawaii, where Claimant lived at the time. EX 128 at 1. Claimant also resided there when Mr. Kegler completed a labor market survey for Oahu on September 2, 1998. EX 127 at 1. Ms. Byers performed labor market surveys for the period of August 1, 1999 to June 1, 2002, for job openings available in Northern Virginia and Washington, D.C., the area where Claimant resided for that period. EX 71 at 1. When Claimant resided in Milwaukie, Oregon, Mr. Stipe performed labor market surveys and reports for that area. EX 61 at 1 (May 14, 2003); EX 96 at 1 (December 31, 2003); EX 98 at 1 (January 2, 2004). Based on the evidence, I conclude Claimant's changes in residence were motivated by a legitimate purpose and that each survey identified the appropriate geographic area for available jobs.

Suitable alternative employment

The Act does not provide a specific standard for determination of the degree of disability for an unscheduled injury, but case law has developed such that this determination must be based not only on a claimant's physical condition but also on other factors, including the claimant's age, education, background, intellectual and physical capacities, employment history and experience, rehabilitative potential, and the availability of work that the claimant can do. *See*, 36 F.3d at 380, citing *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042-43 (5th Cir. 1981). The two-fold test for determining whether a job constitutes suitable alternative employment is whether the job falls within the range of a claimant's capabilities and whether the job is reasonably available such that the claimant could realistically and likely secure it. *Trans-State Dredging v. Benefits Review Bd. (Tarner)*, 731 F.2d 199, 202 (4th Cir. 1984), citing *Turner*, 661 F.2d at 1042-43.

Claimant's education, background, and mental and physical capabilities

Claimant is a 43-year-old high school graduate. EX 61 at 4; EX 128 at 2. Her work history includes cashiering, engraving, clerical work (in sales and auditing), and retail stock work. EX 61 at 5; EX 71 at 3; EX 128 at 2. She received intelligence testing that was administered in 1995. EX 71 at 3. The results reflected a high average level of mental ability on the WAIS-R and an average level for math, spelling and reading on the Wide Range Achievement Test Revision 3. *Id*. She worked for Employer as a stock room worker at the time of the February 1, 1994 injury and her duties included stock work, some basic inventory tasks,

[12] Neither party appears to be contesting the labor markets surveyed, but on remand the Board specified that the issue of appropriate labor market ought to be considered.

and strenuous lifting. TR at 115-16. As discussed in the Decision and Order of November 16, 2004, the physical restrictions imposed by Claimant's work related injury of February 1, 1994 prevent her from performing her usual work prior to the injury, including heavy physical tasks completing inventory. Decision and Order (November 16, 2004) at 20. Dr. Taylor's testimony reflects this as well. CX 20 at 21. Dr. Taylor testified that the restrictions due to her work related injury include no lifting more than 20 pounds, and no repetitive lifting, repetitive bending, or repetitive sitting. CX 20 at 46. To avoid repetitive sitting, Claimant would need to take mini-breaks to get up and stretch. *Id.* Dr. Taylor also opined that in order to surmount both the physical and psychological obstacles to return to work, Claimant would need to be assessed and treated psychologically to provide work-hardening, and that at first Claimant could not be expected to perform a full-time job. *Id*. at 47-48. Dr. Chow recommended Claimant receive chronic pain management and physiatry, as well as psychiatric care, emphasizing the latter to be the most important form of treatment for Claimant. EX 30 at 11.

Labor market surveys

The weight of a vocational counselor's opinion may be discounted where she has not had a personal meeting with the claimant and had no firsthand knowledge of the claimant's capabilities or interests. *See Turner*, 661 F.2d at 1042. If the vocational expert is uncertain whether the positions she identifies in labor market reports are compatible with the claimant's physical and/or mental capabilities, the expert's opinion cannot meet the employer's burden of demonstrating suitable alternative employment. *Uglesich v. Stevedoring Servs. of America*, 24 BRBS 180 (1991); *Davenport v. Daytona Marina & Boat Works*, 16 BRBS 196, 199-200 (1984).

June 5, 1998 Labor Market Survey by Donald Kegler

A labor market survey was performed on June 5, 1998 by Donald Kegler, M.Ed., C.R.C. EX 10; EX 128. On April 25, 2006, Employer's Counsel sent Mr. Kegler a faxed statement as to what his deposition testimony might include.[13] This was taken as guidance by Mr. Kegler "to show me the path." CX 22 at 33-34.[14] However, Mr. Kegler testified that the fax did not impact his testimony in the deposition. *Id*. at 37. Because Mr. Kegler's opinions expressed during the

[13] In the second paragraph of the fax, counsel for Employer wrote the following to Mr. Kegler concerning an upcoming deposition: "I think all you need to say is that (1) Dr. Shulman (sic), the only psychiatrist to see [Claimant] gave her no work restrictions, (2) Dr. Taylor (Claimant's counsel's IME semi-retired neurosurgeon) approved cashier jobs with breaks and your jobs are no more stressful mentally then (sic) cashier jobs, and indeed you had one cashier job, (3) your jobs are similar to the jobs the Judge found were appropriate for the Claimant and (4) your jobs are appropriate with someone with bipolar disorder, prememstrual (sic) mood disorder, and psychogenic pain disorder, since they are within her work restrictions and are not stressful jobs."

[14] It gives me pause to consider the document sent by Employer's Counsel to Mr. Kegler and Ms. Byers which appears to be an attempt by counsel to improperly signal to his client's *independent* experts exactly what he believes the content of their deposition testimony ought to be. *See* CX 23; CX 24. I find it particularly disturbing that, under oath, Employer's Counsel minimizes his communications to Mr. Kegler and Ms. Byers as merely inartfully worded. *See* CX 25 at 10-12. I find it impossible to reduce this matter to semantics alone. The only way to avoid improper communication in this context would have been for Employer's Counsel to refrain from sending the offending paragraph that begins with "I think all you need to say is..." Yet somehow Employer's Counsel fails to see this, given that he casually states in his deposition testimony that he instead could have begun the paragraph with the phrase "Here is information for you to consider." What follows is hardly information for the experts to consider; rather, this paragraph constitutes instructions to the experts that include specific, numerically itemized opinions.

deposition do not appear to have been influenced by the fax sent by Employer's Counsel, I find Mr. Kegler's testimony to be credible and consider it along with his labor market survey and reports.

The jobs in the survey were identified utilizing physical functional capacity information provided to Mr. Kegler by Employer. He also received from Employer Claimant's educational and vocational history and learned Claimant has word processing skills and can drive. EX 128 at 2. However, Mr. Kegler did not meet with Claimant. Mr. Kegler testified that he had no access to Claimant to interview her or perform vocational tests. CX 22 at 13-14. Moreover, Mr. Kegler utilized work restrictions that were three years old. CX 22 at 14; EX 116 at 1; EX 117A at 1; EX 128 at 1 (identifying Dr. Kahanovitz's 1995 work restrictions as those utilized for developing the criteria for the job search).

Mr. Kegler completed a final report on September 2, 1998 which indicated he had contacted Claimant's treating physicians and an independent medical expert. EX 127 at 1. He sent the list of the jobs from the survey to Drs. Chow, Liem and Hoffman for review (for approval or rejection) of positions based on Claimant's physical limitations. CX 22 at 14-15. However, no doctor or other expert reviewed the jobs for whether they are appropriate given Claimant's psychological problems, and because Mr. Kegler was unable to assess Claimant directly, he could not determine whether any psychological problems had any current impact on her ability to work. *Id.* at 16.

Job approval forms submitted by Mr. Kegler to treating providers and employer's expert were completed in July and August of 1998. A September 2, 1998 report by Mr. Kegler stated that three of the four jobs identified in the labor market survey were approved by treating physicians, yet the report did not identify which three jobs. Dr. Chow approved the following four positions: Receptionist; Sales Clerk; Reservations Agent; Rental Service Agents. EX 116 at 2, 4, 6, 7, 9. Dr. Chow disapproved the following three positions because they required frequent bending and twisting as well as stocking shelves: Merchandiser; Shuttler; and Customer Service Representative. CX 22 at 17; EX 116 at 3, 8, 10. He conditionally approved the Telemarketer position if Claimant were able to take mini-breaks to stand up rather than sitting the whole time. EX 116 at 3, 5, 8, 10. Treating provider Dr. Leon Liem (CX 22 at 17) approved all of the positions listed by Mr. Kegler without comment. EX 117 at 1-9; 117A at 3-6. Treating provider Lt. Cmdr. Lori Hoffman, M.D. also approved all of the listed positions without comment. CX 22 at 17; EX 10 at 2-11; EX 30 at 5.

It is unclear why Mr. Kegler indicates three out of four jobs identified were appropriate (EX 127 at 1), given four of eight positions were approved (including one that was conditionally approved) by Dr. Chow. EX 116 at 2-10. In addition, Dr. Chow completed an independent medical evaluation on June 5, 1998 which apparently Mr. Kegler did not review. *See* EX 22 at 16. Dr. Chow diagnosed a failed back syndrome, Status-post L5-S1 fusion for spondylolysis and spondylolisthesis, possible complete fusion of the left side L5-S1, Chronic Pain Syndrome, and possible Bipolar Disorder. EX 30 at 11. Dr. Chow indicated Claimant should receive chronic pain management; psychiatric care and physiatry, emphasizing that the most important is psychiatric treatment. *Id.* He found Claimant to be quite limited with a poor prognosis but opined that Claimant could probably do light to sedentary part-time work for four to six hours a

day. *Id*. at 12.

Mr. Kegler testified that he only reviewed Claimant's medical background, educational background and work history. CX 22 at 7. He did not meet with Complainant and gathered information from Employer and medical records. EX 128 at 1-3; CX 22 at 7. Mr. Kegler stated he asked twice whether he could interview Claimant but was not provided access to do so. *Id.* at 9-10. Mr. Kegler testified that the only information he received as to psychological or emotional problems was in the "referral information from the account or the attorney that indicated that she (Claimant) had had some emotional issues." EX 22 at 16. Mr. Kegler testified that it could be useful to meet a client in person that has psychological issues (*Id.* at 19) and that he could not begin to determine what those issues were without receiving records assessing Claimant's psychiatric problems, noting that "if there were limitations identified in information that was provided to me from treating physicians that addressed the psychological issue then I would have considered that." *Id.* at 25.

It was after completion of the labor market surveys that Mr. Kegler learned that Claimant has serious psychiatric issues. EX 22 at 17. Mr. Kegler read Dr. Schulman's report and noted in his deposition that it did not include limitations that would preclude Claimant from the jobs he identified in the labor market surveys. *Id*. at 37. However, Dr. Schulman's report only indicated Claimant had no work restrictions related to psychological problems at the time of his assessment, in November 2000, and provided no information as to Claimant's psychological functioning at the time of Mr. Kegler's survey two years prior. Dr. Chow evaluated Claimant on June 5, 1998 (EX 30 at 1), the very date Mr. Kegler completed his labor market survey. Mr. Kegler did not have access to Dr. Chow's report, including Dr. Chow's emphatic statement that psychiatric factors must be considered in terms of Claimant's functioning and that psychiatric treatment the most important treatment Claimant should receive. Mr. Kegler was not instructed to consider psychological factors nor did he meet with Claimant. *Id.* at 22. Moreover, in his testimony, Mr. Kegler conceded that unless he meets with and assesses an individual he cannot determine whether psychological problems that are recorded in medical reports could currently impact the individual in terms of her job functioning. *Id.* at 18, 22. He also testified that had he met with Claimant, it would have been beneficial, because some emotional problems and drug-seeking behaviors could become an issue in workplace performance. *Id.* at 19-20. Thus, I find that Mr. Kegler lacked adequate information concerning Claimant's psychological functioning at the time and potential work limitations related to psychological problems.

Employer emphasizes that Mr. Kegler could not think of any questions he would have asked Claimant about her psychological problems based on his review of Dr. Schulman's report. *Id.* at 42-43, 45. This raises two problems. First, Mr. Kegler's response to this question was based on his review of Dr. Schulman's report well after his assessment of Claimant. It is impossible to know what questions might have formed had he first reviewed a current psychological report and then assessed Claimant in person. Second, the report by Dr. Schulman was based on an assessment of Claimant that took place on November 15, 2000 (EX 46; EX 47). Dr. Schulman did not assess Claimant for the time period for which Mr. Kegler completed the labor market surveys, June 5, 1998 and September 2, 1998. EX 10; EX 127; EX 128. I therefore conclude Mr. Kegler's labor market survey cannot provide evidence of suitable alternative employment because Mr. Kegler's review of Dr. Schulman's reports from 2000 and 2001 and the

Decision & Order of November 16, 2004 did not provide him with adequate information to assess Claimant's psychological functioning at the time.

Retroactive Labor Market Survey, August 1, 1999 through June 1, 2001 by Barbara Byers

Barbara K. Byers submitted a retroactive labor market survey on May 20, 2003, covering the period from August 1, 1999 to June 1, 2002. EX 71 at 1; CX 21 at 26. Employer's Counsel e-mailed a statement to Ms. Byers, identical to the one he sent to Mr. Kegler, as to what her deposition testimony might include. CX 21 at 56. However, Ms. Byers testified that this communication in 2006 did not impact her opinion which remained the same as when she formed it in 2003. *Id.* Because Ms. Byers' opinions expressed during the deposition do not appear to have been influenced by the fax sent by Employer's Counsel, I find Ms. Byers' testimony credible and will consider it along with her labor market survey and report.

For the retroactive labor market survey, Ms. Byers relied upon Claimant's response to Employer's interrogatories and request for production dated November 3, 2000, as well as Claimant's physical therapy records, records from the National Naval Center, the evaluations and medical records of Drs. Schulman, Mason, Gordon and Kahanovitz, and the records of Stan Scher, CRC, CPC. Ms. Byers does not appear to have tailored her survey in accordance with Claimant's waxing and waning physical capabilities although this fluctuation is quite obvious in chronic pain patients and apparent in Claimant's medical records. Instead, she chose a wide range of positions, rather than tailoring them according to Claimant's abilities and limitations. Ms. Byers noted some doctors allowed sedentary work, some allowed light duty, and some opined Claimant could do full-time work while others limited her work to part-time only. CX 21 at 26. She decided to include in the survey all of these different kinds of jobs. CX 21 at 26-27.

Ms. Byers also failed to consider the time frames of the medical records in terms of whether and how medical and psychological limitations impacted Claimant at various points over the course of the relevant time period which spans nearly two years. She primarily based her survey on work restrictions that were set by Dr. Gordon in 2002, after Claimant's second surgery. EX 71 at 4. This set of work restrictions was current for April 2002, but the time period surveyed by Ms. Byers was August 1, 1999 to June 1, 2002. Although Dr. Gordon approved the jobs in Ms. Byers' retroactive labor market survey, his approval was conditioned on "assuming no post-surgical complications returned (see report of 4/2/02)". EX 72 at 9. This approval occurred on June 4, 2003. *Id.*

I find that Dr. Gordon did not have sufficient medical data to provide Ms. Byers an adequate evaluation of Claimant's functioning for the entire relevant time period of August 1, 1999 to June 1, 2002. Dr. Gordon first saw Claimant on October 3, 2000 (EX 43 at 1-3), nearly a full year after the first year of the labor market survey period, and he provided no retrospective analysis of work restrictions that Ms. Byers could have utilized. On November 2, 2000, Dr. Gordon issued a report based on the examination of Claimant and a review of medical records. EX 44. He only saw Claimant again when the relevant time period was concluding, on April 2, 2002. EX 52 at 1. I find this intermittent contact with Claimant, coupled with no assessment by Dr. Gordon for Claimant's functioning over the *entire* time period, is inadequate. Dr. Gordon himself emphasized Claimant's functioning is bound to fluctuate over time, depending on her

activities and how they impact her pain levels, given that strenuous activities increase both lower back instability and pain symptoms. CX 17 at 33-34. This is similar to Dr. Taylor's statement that Claimant's functioning varies from day to day as is common for patients with chronic pain. EX 20 at 51-53, 87-88. Accordingly, I find that the evidence shows Dr. Gordon did not have adequate information to evaluate Claimant's functioning for the time period of August 1, 1999 to June 1, 2002. Therefore the labor market survey, which is based on Dr. Gordon's work restrictions, is not adequately tailored to Claimant's capabilities for the time period covered by the survey.

In addition, Ms. Byers never met Claimant to assess her directly for her capabilities or her interests. Although she does not recall the particulars of why Employer did not provide her with Claimant's contact information, she testified that she had no way of getting in touch with Claimant. *Id*. at 13-14, 18, 48. Like Mr. Kegler, Ms. Byers finds it preferable to meet with an individual as part of her assessment to develop criteria for the labor market survey, and so she always asks to meet the individual. CX 21 at 13. However, it would have been difficult for Ms. Byers to assess psychological limitations for the jobs in the labor market survey because the survey was retrospective, and Ms. Byers notes she needs to meet with someone currently to assess any current psychological limitations.

Ms. Byers apparently did not consider whether for the relevant time period Claimant had any psychiatric work restrictions. She read Dr. Schulman's report indicating that Claimant has psychiatric problems for which Dr. Decker was treating her. EX 71 at 1-2. During the time period covered by the labor market survey, Claimant saw Dr. Decker for psychological problems for an acute stress disorder, sexual dysfunction, and medically induced depression apparently related to failed back syndrome. EX 47 at 2. Yet Ms. Byers never sought out Dr. Decker's records although presumably she was aware of Dr. Decker given she read Dr. Schulman's report which refers to Dr. Decker. *See id.; see also* EX 71 at 1. Ms. Byers does not refer to Dr. Decker in her evaluation other than to note that Claimant had sought treatment from him. *Id.* at 2.

From my review of Ms. Byers' report on May 20, 2003 and her deposition on July 19, 2006 (CX 21), I conclude her opinion does not provide any degree of certainty that the positions identified in the labor market survey could be secured and performed by Claimant. The medical data is quite dated in terms of providing current work restrictions. In addition, the independent psychiatric evaluation by Dr. Schulman, which she reviewed for her labor market survey May 20, 2003, was based on an evaluation from November 2000. EX 46. I find that a one-time evaluation that took place a year after the relevant time period was inadequate to provide an informed opinion about Claimant's psychological functioning for the entire period retroactively surveyed. EX 71 at 1. Ms. Byers testified that she did not contact Dr. Decker (CX 21 at 31-34) but instead utilized psychological testing performed on Claimant in 1995, four years prior to the relevant time period. *Id.* at 79; EX 71 at 3.

Evidence of suitable alternative employment should be based on Claimant's actual capabilities. *See Turner,* 661 F.2d at 1042. Ms. Byers testified that her survey was "limited-scope assignment" and that Employer provided her with medical records that she utilized to develop her survey. EX 21 at 13. But the information Employer provided to Ms. Byers to develop the retrospective survey was far too inadequate for the time period spanning August 1,

1999 through June 1, 2001. This dearth of information provided to Ms. Byers made it virtually impossible for her to adequately tailor the labor market survey in accordance with Claimant's capabilities and limitations. Therefore, I conclude that Ms. Byers' labor market survey does not meet the employer's burden of demonstrating suitable alternative employment.

May 14, 2003 and January 2, 2004 Labor Market Surveys by Scott Stipe

Mr. Scott Stipe conducted a labor market survey of Claimant's residential area in and around Milwaukie, Oregon on May 14, 2003. EX 61 at 1. In contrast to Mr. Kegler's report, Mr. Stipe relied upon medical data and work restrictions that were current to Claimant's condition at the time of the labor market survey. *Id.* at 1-2. On March 20, 2003, Dr. Rosenbaum examined Claimant and provided the following work restrictions at that time: sedentary, light and medium work with a 50 pound lifting limit on a non-repetitive basis. EX 59 at 5. Other medical reports varied somewhat, but Mr. Kegler noted none departed drastically from this opinion. EX 61 at 3-4. Mr. Stipe's review of all of the medical data led him to conclude that, at minimum, Claimant could maintain a full-time position doing sedentary to light work. *Id*. at 4.

In preparation for the survey, Mr. Stipe met with Claimant and her husband on April 15, 2003. *Id*. In addition to gathering Claimant's vocational and medical history and assessing Claimant's mental and physical capabilities, Mr. Stipe gathered data from Claimant and her husband regarding her psychological functioning. EX 61 at 3. He noted Claimant reported that while she was living in Hawaii in 1997 she began to have psychological problems related to her pain. EX 61 at 3. He noted that when Dr. Schulman assessed Claimant on November 27, 2000, Dr. Schulman noted Claimant's psychological problems would not preclude Claimant from working EX 61 at 3, referring to EX 46 at 21. He also reviewed Dr. Schulman's addendum report of January 23, 2001 which Dr. Schulman wrote upon reviewing Claimant's records of mental health treatment subsequent to the work related injuries. EX 61 at 2, referring to EX 47, generally. Mr. Stipe also reviewed the following: the labor market survey by Mr. Kegler; Dr. Gordon's reports from October 3, 2000, November 2, 2000 and April 2, 2002; the Decision and Order of March 23, 1999; Claimant's response to Employer's first set of interrogatories on November 3, 2000; writings by Dr. Brian Mason including a medical sources statement on September 19, 2000, correspondence on December 21, 2000 and a report on May 22, 2001; physical therapy chart notes from Therapeutic Associates; Dr. Rosenbaum's evaluation on March 26, 2003 and correspondence on April 14, 2003; and a concurrent letter signed by Dr. David Adler on April 9, 2003. *Id*. at 2-3. On December 31, 2003, Mr. Stipe issued an addendum report (EX 96) and then issued an additional addendum, including additional job listings, on January 2, 2004. EX 98 at 1-3. He also reviewed vocational counselor Stan Scher's performance and psychological testing report from 1995. *Id*. at 8-9.

Mr. Stipe provided employers with information of Claimant's work history, education level, and physical restrictions. He concluded, based on his direct assessment of Claimant and his review of the records, that Claimant had no current psychological limitations on her ability to perform work. Based on a recent examination by Dr. Rosenbaum (EX 59 at 5; EX 63 at 3), Mr. Stipe informed potential employers that Claimant's medical work restrictions included the following: "able to do sedentary/light work (20 pounds occasional, 10 pounds frequent lifting, limited bending, must be able to change positions from sitting to standing/walking frequently)."

Mr. Stipe did not summarize in his reports the specific job requirements or qualifications for all employers surveyed, but each employer opined that Claimant met the specific job requirements and notwithstanding Claimant's limitations she could perform the essential functions of the job. According to Mr. Stipe, the positions identified in his report were within Claimant's limitations, comported with her educational and vocational background, and were locally available. EX 61 at 9-10; EX 96 at 1-2; EX 98 at 3. The labor market surveys included the following positions: Telemarketer; Appointment Setter; part-time Fundraiser; Market Researcher; Cashier; Parking Lot Attendant (part- and full-time); Security Guard; Gate Guard; Tow Truck Operator; Front Desk Clerk; Motel Clerk. A total of 22 employers were listed as hiring for these positions. EX 61 at 10-22; EX 98 at 1-2.

Based on the evidence provided in the record, I find that the Telemarketer, Appointment Setter, Market Researcher, Parking Attendant, and Front Desk/Motel Clerk positions all comport with Claimant's physical restrictions, employment experience, and education level. Claimant appears to have been both medically and psychologically stable at the time and so capable of performing these positions. None of these positions required bending and twisting; some required only occasional walking and standing. Therefore, I conclude that Employer established the existence of suitable alternate employment on May 14, 2003, thereby rebutting a presumption of total disability.

If Claimant is able to present evidence of her diligence in searching for employment, she may nonetheless still be considered totally disabled. *Palombo*, 937 F.2d 70, 73 (2d Cir. 1991); *Turner*, 661 F.2d at 1043. Claimant is not required to apply for the specific jobs identified by Employer, but need only establish that she was reasonably diligent in attempting to secure a job "within the compass of employment opportunities shown by the employer to be reasonably attainable and available." *Turner*, 661 F.2d at 1043. Claimant bears the burden of proving a diligent search and willingness to work. *Palombo*, 937 F.2d at 73.

According to Claimant, she investigated the positions provided in the labor market survey report, but did not believe she was capable of performing the work. Specifically, Claimant testified that she is unable to perform security work because she has a difficult time paying attention; she is unable to perform telemarketer and dispatcher duties because of her inability to work a computer and read well; and she is unable to work as a motel clerk because she has a problem being cordial to the public. TR at 180-82. Despite Claimant's testimony, she failed to provide evidence of the numbers, names, job description or job search protocol to establish evidence of the amount of effort that was actually put into the job search process. As Claimant carries the burden on this issue, I find that she has failed to show that she conducted a diligent search for employment. As a result, I conclude Claimant was capable of working these positions, and thus earning, at minimum, her pre-injury wage, as of May 14, 2003. *See Palombo*, 937 F.2d at 77.

Based on the evidence of Claimant's capabilities and the credited labor market evidence, I find that Claimant was totally disabled from November 6, 1995 to May 14, 2003, after which she

has been, and remains, partially disabled.[15] Claimant's injuries attained permanency on March 20, 2003, for the reasons discussed above. Therefore, Claimant was temporarily, totally disabled from November 6, 1995 through March 30, 1997, and also from May 14, 1997 through March 20, 2003.[16] Claimant was permanently and totally disabled from March 20, 2003 through May 14, 2003. Claimant has been permanently partially disabled from May 14, 2003 to the present.

Wage-Earning Capacity

Section 8(c)(21) of the Act provides that an award for unscheduled permanent partial disability is based on the difference between the average weekly wage and the post-injury wage-earning capacity of the claimant. *Devillier v. National Steel & Shipbuilding Co*., 10 BRBS 649, 660 (1979), citing 33 U.S.C. § 908(c)(21). The purely physical extent of a disability is an important factor in determining unscheduled permanent partial disabilities under the Act, but the claimant's capacity to earn wages is the ultimate fact to be determined. *Id.* Consideration of wage-earning capacity must address the claimant's specific capabilities, that is, age, background, employment history and experience, mental and physical capacities, education, and rehabilitative potential. *Turner*, 661 F.2d at 1037-38. The Act mandates a two-step analysis to determine post-injury wage-earning capacity. *Id*., citing 33 U.S.C. 908(h). The first inquiry requires the determining whether actual post-injury wages reasonably and fairly represent the claimant's wage-earning capacity. *Randall v. Comfort Control, Inc*., 725 F.2d 791, 796-97 (D.C. Cir. 1984). If so, the inquiry ends there. *Id.* However, if actual wages are not representative of the claimant's wage-earning capacity then the inquiry focuses on what dollar amount fairly and reasonably represents that capacity. *Id.*

As discussed above, the undersigned finds that Claimant has been permanently partially disabled from May 14, 2003 to the present, and therefore wage-earning capacity for Claimant's unscheduled injury must be determined. Consideration of wage-earning capacity must address a claimant's specific capabilities, that is, age, background, employment history and experience, mental and physical capacities, education, and rehabilitative potential. *Turner*, 661 F.2d at 1037-38. As discussed above, Claimant's physical capacities include the following: "able to do sedentary/light work (20 pounds occasional, 10 pounds frequent lifting, limited bending, must be able to change positions from sitting to standing/walking frequently) positions required bending and twisting." EX 61 at 4. Claimant is a 43-year-old high school graduate. EX 61 at 9-10; EX 96 at 1-2; EX 98 at 3. Her work history includes cashiering, engraving, clerical work (in sales and auditing), and retail stock work. EX 61 at 5; EX 71 at 3; EX 128 at 2. Her ability to perform work is also tied to her ability to cope with chronic pain and ongoing psychiatric problems, which in turn as Dr. Chow pointed out is tied to Claimant receiving treatment for her mental health. EX 30 at 11. Dr. Taylor emphasized that treatment could help Claimant adjust to working and that at first she would need to start with part-time work, but she is fully capable of working on a full time. CX 20 at 47-48.

[15] As noted above, the parties stipulated to temporary total disability from February 9, 1994 through May 10, 1994 and temporary partial disability compensation from May 11, 1994 to May 25, 1995. EX 2. Claimant contends she is owed compensation as of November 6, 1995.

[16] Claimant concedes that no compensation is due from March 30, 1997 through May 14, 1997 because she was working during that time or at least attempting to work.

The Act mandates a two-step analysis to determine post-injury wage-earning capacity. *Id*., citing 33 U.S.C. 908(h). The first inquiry requires the determining whether actual post-injury wages reasonably and fairly represent the claimant's wage-earning capacity. *Randall v. Comfort Control, Inc*., 725 F.2d 791, 796-97 (D.C. Cir. 1984). If the actual post-injury wages reasonably and fairly represent the claimant's wage-earning capacity, the inquiry ends there. *Randall v. Comfort Control, Inc*., 725 F.2d 791, 796-97 (D.C. Cir. 1984). However, if actual wages are not representative of the claimant's wage-earning capacity then the inquiry focuses on what dollar amount fairly and reasonably represents that capacity. *Id.*

Due to the fact no actual post-injury wages are in evidence, I turn to the available evidence. The positions in Mr. Stipe's surveys that were noted to be in accordance with Claimant's limitations include: Telemarketer ($7.00 to $8.00 per hour); Appointment Setter ($7.00 per hour); Market Researcher ($7.00 to $9.00 per hour); Parking Attendant ($8.50 per hour); and Front Desk/Motel Clerk ($8.00 per hour) positions all comport with Claimant's physical restrictions, employment experience, and education level. As of May 14, 2003, Claimant appears to have been medically and psychologically capable of applying for and working any of these positions, for the reasons discussed above. Although Dr. Taylor noted that initially Claimant would need to ease into full-time work, she is in fact capable of working on a full-time basis. CX 20 at 47-48. Therefore, considering the above positions, I find Claimant was capable of working positions that pay an average of $8.00 per hour on a full-time basis. I therefore conclude that Claimant's post-injury wage-earning capacity is $320.00 per week.

The parties have stipulated that Claimant's average weekly wage is $130.17 per week. EX 2. Thus, the stipulated average weekly wage is less than Claimant's wage-earning capacity. If I were to consider liability for permanent partial disability based on these figures alone, any liability Employer owed to Claimant would end as of May 14, 2003. However, a *de minimis* award must be considered in cases where the worker suffers an unscheduled permanent physical disability, but has not yet suffered an economic loss, in order to honor "the Act's mandate to account for the future effects of disability in fashioning an award." 521 U.S. at 134. Thus, even a disability with only potential substantial [economic] effects "is nonetheless a present disability, albeit a presently nominal one." *Id*. at 135.

Permanent partial disability

A request for a nominal award is encompassed within a claim for a greater partial disability award for an unscheduled injury. *Price v. Stevedoring Services of America,* 36 BRBS 56 (2002), citing *Rambo v. Director, OWCP*, 81 F.3d 840 (9th Cir. 1996), *vacated and remanded on other grounds*, 521 U.S. 121 (1997). A nominal award is appropriate where the claimant does not have a present loss in wage-earning capacity but the medical evidence shows there is a significant potential that the injury could cause diminished earning capacity in the future. *Metropolitan Stevedoring Co. v. Rambo ("Rambo II")*, 521 U.S. 121, 135 (1997); *Brown & Root, Inc. v. Sain*, 162 F.3d 813, 816 (4th Circuit 1998). Although a possible future decline in wages should not be assumed, the *Rambo II* test is a liberal one, which is appropriate for a conservative award that has no present effect on the parties' interests but simply embodies a "wait-and-see approach to provide for the future effects." *Keenan v. Director for Benefits Review Board*, 392 F.3d 1041, 1046 (9th Cir. 2004), citing *Rambo II*, 521 U.S. at 135. Such future effects should be

accounted for even if the injury has been followed by a significant passage of time, unless time has removed one of the factors leading to the determination of permanent partial disability, such as removal of work restrictions or improvement in market conditions. *Keenan*, 392 F.3d at 1047.

Claimant's ability to function has been significantly impacted by her lower back injury of February 1, 1994. In addition, in the time since her injury occurred, Claimant has experienced significant lower back pain with associated sequelae, all of which in turn have contributed to variation, over time, in Claimant's ability to function; the medical evidence indicates that this variation is expected to continue indefinitely. CX 17 at 33-34; CX 20 at 51-53, 87-88; EX 30 at 11. This tendency toward fluctuation in functioning results in the significant possibility that Claimant's condition could worsen, which, in turn, could diminish her ability to perform work. Therefore, I find that the evidence reflects a significant potential for diminished earning capacity in the future. Notwithstanding the absence of a current loss in wage-earning capacity, I find a nominal award of permanent partial disability compensation is appropriate to preserve Claimant's ability to apply for Section 22 modification in the event of a future change in condition. *See Rambo v. Director, OWCP,* 81 F.3d 840, 843 (9th Cir. 1996), *vacated in part on other grounds sub nom., Metropolitan Stevedore Co. v. Rambo,* 521 U.S. 121. Accordingly, I find that Claimant is entitled to a nominal award for permanent partial disability in the amount of $1.00 per week, beginning May 14, 2003, and continuing.

Interest

Claimant is entitled to interest on any accrued unpaid compensation benefits. *Watkins v. Newport News Shipbuilding & Dry Dock Co*., 8 BRBS 556, 559 (1978), *aff'd in part, rev 'd in part sub nom., Newport News Shipbuilding & Dry Dock Company v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). Interest is mandatory and cannot be waived in contested cases. *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992); *Byrum v. Newport News Shipbuilding & Dr Dock Co*., 14 BRBS 833 (1982); *MacDonald v. Sun Shipbuilding & Dry Dock Co*., 10 BRBS 734 (1978). Accordingly, interest on the unpaid compensation amounts due and owing by Employer should be included in the District Director's calculations of amounts due under this decision and order.

Attorney's Fees and Costs

Thirty (30) days is hereby allowed to Claimant's counsel for the submission of an application for attorney's fees and costs. *See* 20 C.F.R. § 702.132. A service sheet showing that service has been made upon all the parties, including Claimant, must accompany this application. The parties have fifteen (15) days following the receipt of any such application within which to file any objections.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law and on the entire record, I issue the following compensation order. The specific dollar computations may be administratively calculated by the District Director.

It is therefore **ORDERED**, that**:**

1. Employer shall pay Claimant compensation for temporary total disability for the period commencing November 6, 1995 through March 30, 1997, and May 14, 1997 through March 20, 2003, at the stipulated compensation rate of $130.17.

2. Employer shall pay Claimant permanent total disability payments for her unscheduled injuries commencing March 20, 2003 through May 14, 2003, at the rate of $130.17.

3. Employer shall pay Claimant compensation at a rate of $1.00 per week, beginning May 14, 2003 and continuing for permanent partial disability.

4. Pursuant to Section 7 of the Act, Employer shall pay all outstanding medical bills related to Claimant's medical and psychiatric injuries and shall furnish reasonable, appropriate and necessary medical care and treatment as required by Section 7 of the Act.

5. Employer is entitled to credit for all payments previously made.

6. Employer shall pay interest on all unpaid compensation benefits from the date the compensation became due until the date of actual payment at the rate prescribed under the provisions of 28 U.S.C. § 1961.

7. All monies owed shall be administratively calculated by the District Director.

IT IS SO ORDERED.

A

Russell D. Pulver
Administrative Law Judge

San Francisco, California